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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the standard for terminating consent decrees in cases involving governmental defendants enunciated in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992) also govern in cases involving private, non-governmental defendants?

2. Did the lower courts err in granting defendants' motions to dissolve the consent decree in this Title VII action when the defendants failed to demonstrate compliance with the decree and in the face of evidence and findings by the court-appointed Administrator and the trial court that defendants were continuing to violate the decree?

PARTIES

The participants in the proceedings below were:

John R. Patterson, Roland J. Broussard, Elmer Stevenson, and the class they represent,

Plaintiffs.

The United States Equal Employment Opportunity Commission,

Plaintiff.

Newspaper & Mail Deliverers Union of New York & Vicinity; New York Times Company; Maxwell Newspapers, Inc. (New York Daily News, Inc.); New York Post; Dow Jones Co., Inc.; Evening Journal Association; Hudson News Company; Metropolitan News Company; Passaic County News Company; Rockland News Agency; Raritan Periodical Sales; Bay City News Company; Brodsky News Co.; Crescent News Distributors Incorporated; Flushing News Company; Gaynor News Co.; Jersey Coast News Co.; Long Island News Corp.; Newark Newsdealers Supply Company; New Brunswick Newsdealers Co.; S. Rachles Newsdealers; Standard News Co.; Union County Newsdealer Supply Co.; Boro Park News Co.; Merit News Co., Inc.; Tribune New York Holdings, Inc.; Westfair Newspaper Distributors; NDI/Newspaper Distributors; Amsterdam News Company; El-Diaro-La Prensa; Fairchild Publications; Magazine Distributors, Inc's and MDI Distributors, Ltd.; A Co.; Bronx County News Company; Bronxville News Company; Brooklyn Daily Inc.; Brooklyn News Company; Brownsville News Co.; East Island News Company; Eluyn News Co.; F. Printico; G.I. Distributors, Inc.; Weinberg News Co.; Imperial News Co.; Long Island Press Publishing Co.; Long View Publishing Co.; Manhattan News Co., Inc.; Mill Basin News Co.; New York News Incorporated; Newark Morning Ledger, Co.; Ridgewood News Company; T Co.,

Defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John R. Patterson, Roland J. Broussard, and Elmer Stevenson, on their own behalf and on behalf of all other persons similarly situated, respectfully pray that a writ of certiorari issue to review the opinion of the Court of Appeals for the Second Circuit entered in this proceeding December 20, 1993.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 13 F.3d 33 (2d Cir. 1993) and is set out at pages 1a-12a of the Appendix hereto ("App."). The order of the Court of Appeals denying a timely petition for rehearing and

suggestion for rehearing *en banc* is unreported and is set out at App. at 13a-14a. The decision of the United States District Court for the Southern District of New York that was affirmed by the Court of Appeals is reported at 797 F. Supp. 1174 (S.D.N.Y. 1992) and is set out at 100a-121a. Other decisions of the district court and of the Court of Appeals that are relevant to the issues presented by this petition and that are referred to herein, are set out in the Appendix as follows: 384 F. Supp. 585 (S.D.N.Y. 1974), 15a-32a; unreported Final Order and Judgment, 33a-35a; 514 F.2d 1767 (2nd Cir. 1975), 36a-54a; 23 E.P.D. ¶ 31,001 (S.D.N.Y. 1980), 55a-62a; 42 E.P.D. ¶ 36,722 (S.D.N.Y. 1986), 63a-67a; 46 E.P.D. ¶ 36,722 (S.D.N.Y. 1988), 68a-74a; 772 F. Supp. 1439 (S.D.N.Y. 1991), 75a-92a; 777 F. Supp. 1190 (S.D.N.Y. 1991), 93a-99a; 802 F. Supp. 1053 (S.D.N.Y. 1992), 122a-133a.

JURISDICTION

The decision of the Second Circuit was entered on December 20, 1993. A timely petition for rehearing was filed and was denied on February 7, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), which provides in pertinent part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions of employment, because of such

> individual's race, color, religion, sex, or national origin;
>
> * * *
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

This case also involves 42 U.S.C. § 1981, which provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

STATEMENT OF THE CASE

A. The Proceedings Below.

This action is based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. It was filed by African American employees of various newspapers on their own behalf and on behalf of a class on July 11, 1973. The complaint alleged that the defendant Newspaper and Mail Drivers' Union (N.M.D.U.) and a number of New York area newspapers and newspaper distributors, including the New York Times and the Daily News[1], had engaged in a variety of practices that had the purpose and effect of discriminating against African American drivers. (J.A. 1-14.)[2] Subsequently, an action making similar allegations was filed by the United States Equal Employment Opportunity Commission. (J.A. 30-38.) The two cases were consolidated for all purposes and a four week trial on the merits was held in 1974 before then District Court Judge Lawrence W. Pierce.

After the trial had concluded, the parties entered into a settlement agreement that was approved by Judge Pierce, who made findings of fact and entered a consent decree that embodied the injunction at issue here. *Patterson v. NMDU*, 384 F. Supp. 585 (S.D.N.Y. 1974). (App. 15a-35a.) A white worker objected to the decree and filed an appeal to the

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[1]Although the consent decree was signed by virtually all of the newspaper publishers and distributors in the New York Metropolitan Area for whom the N.M.D.U. is the bargaining agent, only N.M.D.U. the New York Times, the New York Daily News, and the New York Post were actively involved in the proceedings that led to the dissolution of the consent decree that is at issue here. Only the Times and the News actually participated in the appeal in the Second Circuit.

[2]Record citations are to the Joint Appendix filed below ("J.A.") or to the original record.

Second Circuit. The court affirmed the entry of the decree on March 20, 1975 and the case was returned to the district court. *Patterson v. NMDU*, 514 F.2d 767 (2nd Cir. 1975). (App. 36a-54a.)

On November 9, 1979, a number of the defendants moved to modify the decree by eliminating the role of the Interim Administrator. Judge Pierce denied the motion on a number of grounds, including a finding that the goals and timetables provisions had not been met, and that there continued to be claims that the decree was being violated in a number of respects. (App. 55a-62a.) In 1985, the Times and other defendants filed a second motion. Since Judge Pierce had been elevated to the court of appeals, the case had been assigned to Judge Conner in 1982. Both the private plaintiffs and the EEOC opposed the motion and various proceedings took place, which will be described in more detail below. Finally, on July 29, 1992, Judge Conner issued an order vacating the injunction in its entirety, although jurisdiction was retained to resolve certain outstanding claims by class members. Judge Conner also denied a motion to alter and amend the judgment and a motion by private plaintiffs to restore the injunction pending appeal. (App. 100a-121a; 122a-133a.)

Both the private plaintiffs and the EEOC appealed. The Second Circuit affirmed, holding that the standard enunciated by this Court in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992) for vacating or modifying consent decrees when the defendant was a local governmental agency should be applied in all cases. The court acknowledged a division between the circuits on this issue. (App. 9a.) The Court of Appeals did not mention or discuss the issue of the defendants' failure to demonstrate that they had complied with all aspects of the decree over a reasonable period of time, or the evidence introduced by the petitioners that, in fact, various of the defendants had violated the decree. Petitioners filed a

petition for rehearing and a suggestion for rehearing *en banc*. The petition for rehearing was based on the failure to deal with the issue of violations of the consent decree; the suggestion for rehearing *en banc* was based on whether *Rufo* should apply where the defendant was not a governmental agency. The petition for rehearing was denied without opinion on February 7, 1994.

B. Statement of the Facts.

1. History of Discrimination in the Industry.

Although this case was settled by the parties, Judge Pierce had before him the record of a four-week trial on the merits of the claims of racial discrimination in the industry. Thus, when he approved the decree he made detailed findings of fact. The focus of the claims were jobs at all of the newspapers and other publishers who employed members of the Newspaper and Mail Drivers Union to deliver newspapers and other periodicals in the metropolitan area of New York City and outlying areas.

Judge Pierce described the way the industry functioned:

> The nature of the delivery industry is such that the employers' needs for delivery department employees vary from day to day, and indeed, shift to shift, depending upon the size and quantity of the publication(s) being distributed. Thus, each employer . . . maintains a regular work force (Regular Situation holders) for its minimum needs, and depends upon daily shapers to supplement the force. . . . [A]t the major employers the shapers are categorized into groups with descending daily hiring priorities. Group I is restricted . . . to persons who have at one time held a Regular Situation in the industry. They have first shaping priority at every shift, in order of their

> shop seniority. After the Group I is exhausted . . . the next hiring priority shall go to Group II members [consisting] of all persons in Group I and all persons holding Regular Situations in the industry. . . . [T]he remaining open jobs, if any, will go to Group III members who have appeared for the shape, in order of their shop tenure.

(App. 19a.) All of the jobs involve equivalent skills, regardless of which list the worker who fills them is on. The jobs are unskilled and most workers either drive trucks or do floor work. Because the contract provides that a Regular Situation is required for Union membership, only Regular Situation holders and members of Groups I and II are Union members. Finally, the Group system provides the priority list for filling Regular Situations as they may become vacant. (App. 20a.)

The Union was founded in 1901 and apparently had no minority members. Historically, the Union constitution limited membership to "the first born legitimate son" of a member. (App. 20a.) The industry had a closed shop and Union members were consistently hired before non-Union men at all industry shapes. Prior to 1952, when the Group structure was adopted, the Union's nepotistic policy resulted in discrimination against minorities (and, of course, women) and foreclosed them from any employment in the industry. Although the Group structure appeared on its face to discard discriminatory policies and to open up Union membership and employment policies to the entire labor force, "there is uncontroverted evidence that certain . . . provisions of the contract have been administered haphazardly, and that the Group structure has been circumvented by friends and family of Union members. In practice . . . no non-Union Group III shaper in the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group system since 1963." (App. 21a.)

Since minorities had historically been denied free and equal access to Union membership, the result was that they continued to be almost totally excluded from the industry. In 1974, there were 4,200 members of the Union, including 900 pensioners. *More than 99% of these Union members were White.* Of 2,855 persons actively working in the industry, including 2,460 Regular Situation, 123 Group I members, and 272 Group III members, only 70 persons — *or 2%* — were African American, Spanish-surnamed, Asian, or Native American. (App. 21a-22a.)

Thus, twenty years after the industry instituted a purportedly neutral Group structure of employment and hiring priorities, minorities were still almost totally excluded from the industry. Based on statistical analyses presented by the EEOC, Judge Pierce found that the relevant work force for the industry in 1974 was 30% minority. Therefore, their participation was "still grossly disproportionate" to what would be expected in the absence of discrimination. (App. 22a.)

2. The Consent Decree.

Based on the above findings regarding discrimination against minorities in the industry, Judge Pierce approved the settlement agreement presented by the parties. (J.A. 50-99.) All parties voluntarily agreed to the entry of an injunction that was designed to end the entrenched practices in the industry that had excluded minority workers.

The injunction was in three parts, all of which ran against both the union and the employers. Section A, titled "Equitable Relief" was described by Judge Pierce thus: "As with many resolutions of employment discrimination cases, the Settlement Agreement in these actions contains general provisions permanently enjoining the defendants from discriminatory practices in violation of Title VII." (App. 22a.) Section A provides, *inter alia*:

defendant [NMDU] . . . will be *permanently* enjoined

> from engaging in any act or practice which has the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin . . . nor shall they take any action which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin.
>
> defendant employers . . . will be *permanently* enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals in their bargaining units represented by NMDU on the basis of race, color or national origin. They shall not fail or refuse to hire for employment any such individual on the basis of race, color or national origin, not shall they take any other action which would deprive any such individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin.

(J.A. 57-58.)(Emphasis added.)

Section B of the consent decree established an Administrator, who was empowered "to take all actions . . . as he deems necessary to implement the performance of the Order." The Administrator was not only to supervise the new affirmative action provisions of the decree closely, but also to closely supervise "employment opportunities in the industry on behalf of all workers." (J.A. 59) The powers of the Administrator included determining "all complaints that any individual in the bargaining units in the industry represented by NMDU has been allegedly denied equal employment opportunities on the basis of race, color or national origin." (App. 57a.) Some of the Administrator's duties were explicitly tied to rectifying or deterring areas of

industry practice that were particularly abused in the past — *e.g.*, use of layoffs and transfers to "jump" non-minority drivers over minorities, or issuing arbitrary Group lists.[3]

Section C of the decree, entitled "AFFIRMATIVE ACTION PROGRAM," provided that the defendants shall institute an affirmative active program "designed so that a sufficient number of minority workers [Black, Spanish-surnamed, Oriental, and American Indians] will be employed by the defendant employers (and accepted for membership by NMDU as provided herein) within the bargaining units represented by NMDU in order to achieve a minimum goal of 25% minority employment in the industry within such bargaining units *by June 1, 1979*." (J.A. 60-61; emphasis added.) The decree contained detailed provisions by which the goal of 25% minority employment by June 1, 1979, was to be reached. The Administrator was given broad powers to oversee the carrying out of the affirmative action plan and

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[3]Judge Pierce further described the role of the Administrator:

> The Administrator appointed in these consolidated actions will be charged with the responsibility of seeing that the terms of the Settlement Agreement under Title VII of the Civil Rights Act of 1964 are diligently and conscientiously implemented. This Act was designed primarily to protect, and provide a more effective means to enforce, the civil rights of persons within the jurisdiction of the United States. It aims, inter alia, to eliminate discriminatory practices by businesses, labor unions, or employment agencies and thereby to encourage the growth of economic opportunities for minority individuals, thus strengthening the economic foundation essential to the full enjoyment of civil rights.
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> * * *
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> In light of these broad national purposes, this Court considers it of paramount importance that the Administrator it appoints here possess a finely tuned sensitivity to the social impact of past discriminatory employment practices, and a balanced sense of dedication and commitment to the elimination of these practices.

(App. 30a.)

to ensure that the goal was reached. Judge Pierce summarized the major features of the plan:

> . . . elimination of past abuses of the Group system; elimination of the contract provision which restricted Group I to former Regular Situation holders; provision for an orderly flow of Group III shapers—alternating one minority person with one non-minority person—into steady and secure employment in the industry, first as members of Group I and from there, as Regular Situations become vacant, to Regular Situations. Union membership will be offered to each Group III worker as he reaches the bottom of Group I. *The plan further provides that until the 25% minority employment goal is achieved, employers shall hire, at the entry level, three minority persons for every two non-minority persons.* In addition, minorities who are presently active on Group III at the News and the Times will immediately move to the bottom of the Group I list, with an equal number of non-minorities to immediately follow them onto the Group I list.

(App. 23a-24a; emphasis added.)

With regard to the 25% minority employment goal in particular, Judge Pierce's opinion made findings that it was justified because the relevant workforce *as of 1974* was 30% minority. Therefore he held that a goal of 25% minority representation in the industry by June, 1979, was appropriate. (App. 28a-29a.)

The Second Circuit affirmed Judge Pierce's order in all respects. In its decision it recited the long history of discrimination in the industry:

> While the current Group Structure, which was adopted in 1952, appears on its face to open Union membership to anyone in the labor force, Union membership, because of lax administration of the

contract provisions, has largely remained attainable only by the family and friends of a Union member.

Manipulations of the system that resulted in the maintenance of a virtually all-white work force included "artificial inflation of the Group I lists," "fictitious lay-offs," and "outright false assertions of Group I status by persons who have obtained Union membership cards, the validity of which have not been challenged by employers." These practices violated Title VII by locking in "'minorities at the non-union level of entry in the industry, and thereby . . . perpetuat[ing] the impact of past discrimination.'" (App. 40a-41a.) The court affirmed the propriety of the 25% hiring goal specifically on the basis of its relationship, as found by Judge Pierce, to the relevant labor force as demonstrated by the 1970 census. (App. 44a.)

3. Compliance with the Affirmative Action Provisions.

In late 1979, defendant New York Daily News filed a motion seeking relief, under Rule 60(b), F. R. Civ. Proc., from certain provisions of the decree, particularly termination of the Administrator, whose term was set at five years, subject to being extended by the Court. Judge Pierce denied the motion and reappointed the Administrator as Interim Administrator. Judge Pierce specifically noted the failure of the defendants to meet the 25% goal within the time provided by the decree. Indeed, he found that the industry was only 12.16% minority, less than half of the goal that was set five years before. (App. 58a.)

4. The Role of the Administrator.

Throughout the life of the decree, the Administrator has played a vital role in overseeing compliance. Under the provisions of the settlement agreement, minority workers were able to file claims and to secure orders, where justified, to require compliance. Between 1974 and the end of 1981, at least 91 claims had been submitted and adjudicated, in some instances through appeals to the district court judge.

By the date of the dissolution of the decree, at least 278 claims had been submitted to the Administrator. Of key importance, as will be discussed in more detail below, has been the Administrator's role in ensuring that proper Group III and Group I lists were promulgated and in verifying the level of compliance with the Affirmative Action plan.

5. The Motions to Dissolve the Consent Decree.

In April, 1985, a number of the defendants filed new motions to vacate the order of Judge Pierce with regard to the Affirmative Action provisions and the Administrator. The basic argument made in support of these motions was that the 25% goal had been reached and that therefore the decree was no longer necessary.

Both the private plaintiffs and the EEOC strenuously objected to these motions.[4] Both agreed that Section A of the decree, embodying permanent injunctive relief, should be retained in its entirety. The private plaintiffs also urged that the court retain both the affirmative action provisions and the Administrator until full compliance with the decree had been demonstrated.

Judge Conner ordered that notice be given to the class that the Consent Decree might be vacated. After extensive pre-hearing briefing, an evidentiary hearing was begun in 1987. Judge Conner suspended the hearing when it became evident that the defendants could not prove that minority employment had in fact reached an asserted 24.89% industry-wide. (J.A. 272-73.)

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[4]While the EEOC initially took the position that the Administrator should be retained, in 1991 it took the view that only the permanent injunction provisions needed to be retained.

6. Plaintiffs' Response — The History of Non-compliance.

Plaintiffs presented substantial evidence that there had been a consistent pattern of violations of the decree. Specifically, *after* the defendants had filed their repeated motions to vacate the decree, the Administrator found various of the defendants had violated the decree and engaged in intentional discrimination. The following examples are illustrative.

a. In 1987 the Administrator held that the Daily News and the NMDU had violated the decree when they issued a new Group III list. The Administrator required them to use a revised list that was constructed in adherence to the requirements of the permanent injunction in Part A of the Decree and that would be consistent with the goals and timetables provisions in Part C. Judge Conner affirmed the decision on appeal by the NMDU. (App. 68a-74a.)

b. In 1990 the Administrator held that the New York Times and the NMDU had engaged in intentional discrimination in violation of a number of the provisions of the Decree, including Part A, when they issued a new Group III list that did not comply with the 3/2 ratio required by the Decree. He also found that the Times and the Union violated ¶ 15 of the decree dealing with the standards to be followed in giving preferences to certain employees to be placed on a Group III list, ¶ 29, dealing with the establishment of a system for the submission of applications, and ¶¶ 1 and 2, the general injunction provisions, in that there was intentional discriminatory treatment with regard to the offlist hiring of minority employees and other practices of the industry.[5] (J.A. 415.) Again, the decision of the

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[5]The Administrator had instructed the Times and the Union not to issue the list, but they did so anyway. The hearing on this matter (Claim 186) began in October, 1985, and ended 6,000 transcript pages later in May 1988. As a result of the Administrator's subsequent

Administrator was affirmed by Judge Conner. (App. 75a-92a).

c. In 1991 the Administrator found that the NMDU and the Westfair Newspaper Distributors had engaged in intentional discrimination and retaliation in violation of Part A by passing over two minority workers in favor of white workers. (J.A. 537-38.)[6]

d. In 1989 the Administrator found that a black driver had been discharged by Metropolitan News for racially motivated reasons. (J.A. 397.) On appeal to Judge Conner, the claim was settled by giving the claimant a Regular Situation and damages. (Rec. #224.)[7]

In addition, in 1991 plaintiffs submitted to the district court and the Administrator, as an Offer of Proof in opposition to the Motions to Dissolve the Decree, the affidavits and declarations of 29 minority employees attesting to continuing acts of discrimination in violation of the Decree. The complained of acts included restrictions in training opportunities, discrimination in the filling of foreman and supervisory positions, and an increase in retaliation and threats for complaining of discrimination.

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orders with regard to Claim 186, half of the 47 Regular Situation positions filled in the summer of 1992 went to minority workers. Proceedings to determine back pay for the Claim 186 claimants are still pending.

[6]This claim was settled by the parties pending an appeal to Judge Conner.

[7]In addition to these post-1985 claims, in 1984 the Administrator found that the New York Post and the Union had violated ¶ 15 of the Decree and had obstructed "the goals of the consent decree in seeking minority employment." He required the reordering of the Group I list and the Regular Situation Holders. Administrator's Decision in Claim 165, Jan. 4, 1984, p. 1. (Rec. # 69.) This order was affirmed by Judge Conner on July 10, 1984. (Rec. #73.)

Plaintiffs' Offer of Proof and Declarations, August 19, 1991. (Rec. #228.)

As noted above, in 1987 Judge Conner found the evidence insufficient to establish that the industry as a whole had met the 25% goal. (J.A. 277.) However, in 1988 he suspended the 3/2 ratio for placing workers on the Group III list. (J.A. 310.) Further briefing was requested on the defendants' motions to dissolve the decree. In the meantime, other individual claims of discrimination continued to be filed with the Administrator relating, inter alia, to carrying out the relief ordered with regard to the above listed matters. It was not until 1991, after Judge Conner ordered that compliance reports relating to the 25% goal be verified, that the defendants adduced legally competent evidence to support their claim that the goal had been reached and that 27.97% of the Regular Situation holders in the industry were minority.

The plaintiffs, on the other hand, argued that the goal should be adjusted to reflect the current labor market, which had increased to 42.4% minority according to the 1980 census[8] and to over 50% minority according to the 1990 census.[9] Since the 25% goal had not been reached until 12 years after the decree required, they suggested, the goal should be adjusted to reflect changed circumstances.

7. The Decision of the District Court.

On August 8, 1992, Judge Conner issued his decision dissolving the consent decree and the injunction embodied in it in its entirety. The reason given was that the 25% goal had been reached and that therefore the purpose of the decree had been satisfied. With regard to the private plaintiffs' evidence that the defendants had violated anti-

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[8]Judge Conner accepted this figure as accurate. (J.A. 265.)

[9]J.A. 697-98.

discrimination provisions of the decree in a variety of respects, the court held:

> Even assuming, *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree.
>
> * * *
>
> . . . The Court granted the LDF an opportunity to request an evidentiary hearing before the Administrator *on the only fact relevant to the issue of whether to terminate the Consent Decree -- whether the 25% minority employment goal has been achieved.* The LDF did not avail itself of that opportunity for over six months and cannot be heard to complain now.

(App. 114a-115a; emphasis added.)

The private plaintiffs filed a notice of appeal and a motion to reinstate the injunction pending appeal. In support of that motion they introduced affidavits from minority workers alleging further current discriminatory actions. (J.A. 719-77.) Although the district court denied that motion, it reaffirmed the jurisdiction of the Administrator to enforce prior orders and to resolve claims filed prior to August 8, 1992. (App. 127a-128a.) The EEOC also filed a notice of appeal. As noted above, the Court of Appeals affirmed the decision of the district court without mentioning, let alone addressing, the evidence of continuing violations of the decree.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents important issues concerning the standards that govern the dissolution of a consent decree entered as part of a negotiated settlement. Although this is a civil rights case, the decision below necessarily applies to all actions brought under federal law in federal court. *First*, the case raises squarely the question of whether this Court's seminal decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932) has any continuing vitality or whether, as the lower court held, it has been overruled *sub silentio* by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992).[10]

Second, the case raises the question of the meaning of the requirement reiterated by this Court in *Freeman v. Pitts*, 503 U.S. ___, 118 L.Ed.2d 108, 139 (1992), *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991) and *Rufo*, 116 L.Ed.2d at 886-87, that a defendant has a heavy burden of demonstrating good faith and substantial compliance with a consent decree as a precondition to having it modified or dissolved.

Third, the decision below has important implications concerning the binding effect of negotiated settlements and the impact on the settlement process of defendants being able to obtain dissolutions of consent decrees without demonstrating full compliance with all aspects of the agreement. In short, the question is, should a prohibitory injunction be vacated in the face of proof of continuing violations, based solely on proof (here disputed) that relief

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[10]Here, the issue arises in a case involving a negotiated settlement that embodies an injunction. The issue of whether the standard of *Swift* or that of *Rufo* governs modification or dissolution of an injunction also arises when the injunction has been imposed by a federal court as a result of a litigated case.

designed to remedy *past* acts of discrimination has been carried out.

I. THE CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE STANDARD THAT SHOULD GOVERN THE DISSOLUTION OF CONSENT DECREES ABOUT WHICH THERE IS CONFLICT BETWEEN THE CIRCUITS.

The basis for the decision below was that the standard established for modifying or dissolving consent decrees established by *United States v. Swift & Co., supra*, had effectively been superseded by this Court's decisions in *Dowell* and *Rufo*. The court acknowledged that the district court's decision in this case was apparently the first that so held (App. 8a.) It also acknowledged that "[a]mong other circuits, there appears to be some dispute as to the appropriate standard for modifying consent judgments." (App. 9a.)

Indeed, it is apparent that there is both conflict and uncertainty in the lower federal courts as to whether *Dowell* and *Rufo* overruled *Swift & Co.* Thus, while the Seventh Circuit has held that *Swift & Co*, was completely overruled by *Rufo* (*In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993)), the Sixth and Eighth Circuits have only applied *Rufo* to cases involving governmental entities (*Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992); *Epp v. Kerrey*, 964 F.2d 754 (8th Cir. 1992)), and the Federal Circuit has declined to apply the *Rufo* standard to commercial litigation involving a private defendant (*W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992)). The lack of certainty in the lower courts was recently discussed in the A.T. & T. anti-trust case, *United States v. Western Electric Co., Inc.*, ___ F. Supp. ___, 1994 WL 143082, p. 6 (D.D.C. April 5, 1994), citing *United States v. Western Electric, Co., Inc.*, 969 F.2d 1231, 1235 n. 7 (D.C. Cir. 1992).

Of course, neither *Dowell* nor *Rufo* explicitly overruled *Swift & Co.* To the contrary, those decisions only held that the *Swift* standard should not be applied to cases involving local government institutions because permanent governance by a federal court tended to undermine the representative and democratic character of such institutions. The fact that *Swift* was not explicitly overruled, in decisions that discuss its principles at some length, militates against a conclusion that *Swift* was, nevertheless, overruled *sub silentio*.

In any event, given the importance of the role of settlement and consent decrees in disposing of litigation in the federal courts, it is imperative that both litigants and the lower courts understand clearly what is the standard governing modification and dissolution of consent decrees. Therefore, this Court should grant certiorari to clarify and make explicit whether and to what extent the *Swift* standard still has vitality.

II. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH DECISIONS OF THIS COURT THAT REQUIRE THAT A DEFENDANT DEMONSTRATE COMPLIANCE WITH A CONSENT DECREE BEFORE THE DECREE CAN BE DISSOLVED.

As set out above, the district court itself had held on a number of occasions *after* the motions to dissolve the injunction had been filed, that both the Union and various of the other defendants had violated the decree and, indeed, had committed acts of intentional discrimination. Moreover, the private plaintiffs, petitioners herein, had introduced and proffered extensive evidence of other violations of specific provisions of the decree during the same period of time.

Nevertheless, the district refused to consider this evidence, holding that it was "irrelevant" in deciding whether to dissolve the decree in its entirety. Rather, it held that since one provision of the decree, that the industry have 25%

minority drivers, had been complied with, the decree could be dissolved.[11]

Under the decisions of this Court, it was clear error for the district court to hold that whether the defendants had continued to violate the consent decree was irrelevant to whether the decree should be dissolved. It was also error for the Court of Appeals to fail even to address this contention of plaintiffs. Thus, in *Dowell* the Court directed the district court to "address itself to whether the Board had complied in good faith with the . . . decree since it was entered" in deciding whether the decree should be dissolved. 498 U.S. at 249-50. *Rufo* held that where modification of a decree is sought because of unforeseen changed circumstances that make compliance difficult or "substantially more onerous," the party seeking modification must "satisfy a heavy burden" to demonstrate that it "made a reasonable effort to comply with the decree." 116 L.Ed. 2d at 886-87. And in *Freeman*, the Court made clear that a demonstration *by the defendant* of good faith compliance with a decree is a prerequisite to being relieved of its requirements. Thus, "[w]hen a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have without hesitation approved comprehensive and continued district court supervision." 118 L.Ed.2d at 139. Moreover, a demonstration of good faith compliance with part of decree

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[11]The petitioners continue to dispute whether even this provision of the decree had been complied with. The decree is clear that the goal was to achieve 25% minority representation *by June 1, 1979*, when such representation would reasonably reflect the relevant labor market. That goal was not achieved, and the defendants could not demonstrate that the industry was over 25% until 1991, twelve years late, and when the relevant labor market was over 50% minority. Thus, the effect of the lower court decision was to convert a goal designed to measure reasonable compliance into a rigid upper-limit quota that freed the defendants from further compliance with the settlement.

can *only* result in relief from those parts of the decree complied with. *Id.* at 139-40.

The decision below is therefore in clear conflict with governing decisions of this Court. Even if the *Swift* standard does not govern, the decisions in *Dowell*, *Rufo*, and *Freeman* mandate reversal.

III. The Decision of the Court Below Will Undermine the Settlement of Cases in Federal Court.

This Court has repeatedly held that the settlement of cases is highly favored, and has applied this rule to civil rights litigation on a number of occasions. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 732-33 (1986); *Marek v. Chesny*, 473 U.S. 1, 10 (1985). Albeit unintentionally, the decision below will substantially discourage plaintiffs from settling complex employment discrimination and other civil rights litigation.

Settlement decrees in these types of cases are achieved through an extensive and complicated process of negotiation. The result is inevitably a compromise, based on interdependent promises and obligations. A carefully framed decree will spell out the relationships between its provisions and when and under what circumstances certain provisions may be terminated. The decree in the present case is no exception.

As set out in the Statement of the Case above, the decree contained general prohibitions against discrimination, as well as a variety of specific obligations undertaken by the defendants, including receiving and processing applications for membership, the handling of grievances on a nondiscriminatory basis, the admission to membership in the Union of persons listed on an employer's Group I list on the same basis as others, assisting persons to obtain and retain membership, and the maintenance of registers and other

records. The decree also contained affirmative action provisions keyed to the goal of 25% minority representation by June 1, 1979, and provided for an Administrator to oversee the carrying out of the decree and to receive and adjudicate complaints of noncompliance.

The affirmative action provisions are intended to further the fundamental purpose of the decree that are set out in Part A, *i.e.*, the elimination of discrimination in the industry. The 25% representation was to be reached by June 1, 1979, when that representation was still related to the relevant labor market. If that goal was met on time, then the 50% and 60% hiring ratios would end. However, the settlement contemplated that the permanent parts of the decree would remain, and that the defendants would continue to be enjoined from engaging in discrimination prohibited by Title VII and by the decree itself, as well as required to follow various procedures set out in the decree. Of course, under principles now made clear by this Court, the defendants could seek the dissolution of even these parts of the decree by meeting their burden of demonstrating good faith compliance, *i.e.*, that they were no longer engaged in acts of discrimination. This they utterly failed to do.

Rather, the Court of Appeals has sanctioned virtually unlimited and unreviewable discretion to district courts to rewrite and dissolve a comprehensive settlement if any part of it has been complied with. This result derives from what the court below termed a "flexible standard for modifying decrees" whose purpose is to correct pervasive discrimination in an entire industry.

The message of the decision below to defendants, therefore, is that belated compliance with some goal embodied within a complex decree will mean freedom from all other contractual obligations into which they freely entered. The message to plaintiffs is equally clear; they can no longer rely on the sanctions of the law to enforce a settlement decree carefully negotiated and approved. Not

only do defendants not have to demonstrate compliance, but their protracted violation of a decree will be deemed "irrelevant." Plaintiffs' proof of continuing and serious breaches of an agreement and continued rampant discrimination will result in their being told that they must bring a new lawsuit.[12] Intransigence, if persisted in long enough, will thus be rewarded.

The combined force of these messages to plaintiffs is that only if they go forward and prove discrimination can they have confidence that a decree will remain in force until it is obeyed. A settlement, no matter how broad and inclusive it may be, cannot be relied upon. Such a result destroys any incentive for plaintiffs to enter into a settlement and, therefore, undermines the favored status of settlements established by decisions of this Court.

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[12]See the Appendix at 114a-116a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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No. 93- 931784 MAY 9 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Nos. 1476, 1480 -- August Term, 1992
Docket Nos. 92-7964, 6242

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, ROLAND J. BROUSSARD, ELMER STEVENSON, on their own behalf and on behalf of all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellants,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees.

Argued June 21, 1993
Decided December 20, 1993.

Before: NEWMAN, Chief Judge,
VAN GRAAFEILAND and ALTIMARI, Chief Judges.

Appeal from the July 30, 1992, order of the United States District Court for the Southern District of New York (William C. Conner, Judge) vacating a consent decree originally approved in 1974, 797 F. Supp. 1174 (S.D.N.Y. 1992).

AFFIRMED

JON O. NEWMAN, Chief Judge:

This appeal primarily concerns the appropriate standard for modification of a consent decree in litigation not involving a governmental entity as a party. The Equal Employment Opportunity Commission ("EEOC") and a class of minority employees appeal from the July 30, 1992, order of the District Court for the Southern District of New York (William C. Conner, Judge). vacating in its entirety a consent decree originally approved in 1974. *Patterson v. Newspaper & Mail Deliverers' Union*, 797 F. Supp. 1174 (S.D.N.Y. 1992). The decree created a comprehensive affirmative action program for New York City area Newspaper Deliverers. In addition, the decree contains broad prohibitions against discrimination and provides for an Administrator to enforce the anti-discrimination and affirmative action provisions. On appeal, EEOC and the minority employee class represented by the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), contend that the District Court applied the wrong standard in deciding whether to modify any aspect of the decree. LDF argues that none of the decree should have been vacated; the EEOC argues that the District Court erred in vacating the anti-discrimination provisions, but takes no position with respect to the affirmative action program and the Administrator.

We conclude that the District Court applied the correct standard and was entitled to vacate the entire consent decree since its essential purpose had been achieved. We therefore affirm.

Background

Through closed and union shop agreements, defendant Newspaper & Mail Deliverers' Union ("the Union") controls access to newspaper and publication delivery jobs in the New York City region. From 1901 to 1952, the Union limited membership to the legitimate first-born sons of other Union members. In 1952, the Union abandoned its primogeniture system, and, with the cooperation of the New York City area newspapers and

publishers, adopted a new series of membership and work rules. This system divided workers into those holding permanent jobs, which are said to have "regular situations," and those employed irregularly, who are called "shapers." The shapers were further divided into groups with descending daily hiring priority. Each employer maintained a "Group I" list, which was restricted to persons who had once held regular situations in the industry. After offering daily work to each person on the Group I list, the employer next looked to an industry-wide Group II list, which consisted of all persons in the industry on Group I lists or holding regular situations. Thus, Group II provided an opportunity for deliverers to supplement their income at an employer other than their usual employer. If additional daily work was available, the major employers would look to a Group III list, which consisted of persons who appeared for daily work a minimum number of times per week, even if no work was available. Union membership was limited to persons holding regular situations, and minorities were discouraged from joining the Group III lists. Moreover, although by contract the group lists provided the basis for filing vacant regular situations, various abuses made it nearly impossible for anyone to move from Group III to a regular situation. The Union allowed employees at one employer to shift to the Group I list of another employer and occasionally provided Group I status to relatives and associates of Union members.

In 1973, EEOC and a group of minority deliverers, who sued for themselves and others similarly situated, brought separate actions against the Union and the employers under Title VII of the 1964 Civil Rights Act. They contended that the 1952 system, although facially neutral, perpetuated discrimination against minorities. The cases were consolidated and brought to trial before then-District Judge Pierce. After all the evidence was presented, but before the District Court ruled, the parties entered into a settlement agreement, which Judge Pierce approved and

incorporated into a final judgment. *Patterson v. Newspaper & Mail Delivers' Union*, 384 F. Supp. 585 (S.D.N.Y. 1974). The judgment directs the Union and employers to implement and perform the agreement, and retains jurisdiction in the District Court for enforcement and any subsequent applications. In a written opinion, Judge Pierce made detailed factual findings of a long-established pattern of discrimination against minorities. Statistically, minorities accounted for 30 percent of the eligible workforce, and only two percent of deliverers (with an even smaller percentage among regular situation holders and Group I members). We affirmed Judge Pierce's decision over the objection of White Group III deliverers who complained that the agreement unfairly favored minorities. *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

The settlement agreement contains five sections. The introductory section consists of a series of "whereas" clauses, stating that there has been no admission of a violation of law but acknowledging the existence of a "statistical imbalance" in minority representation. The final clause of this section states that the agreement "is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the aforesaid statistical imbalance not existed." Section A of the agreement consists of broad prohibition against any action with a discriminatory effect by either the Union (¶ 1) or employers (¶ 2). Section B of the agreement creates the office of the Administrator. The Administrator is authorized to resolve all complaints involving disparate treatment, subject to review by the District Court (¶ 4). His term is fixed as "an initial period of five (5) years"; subsequently he or his successor "shall remain in office if and for such time as the Court may direct" (¶ 6).

Section C of the agreement is a detailed affirmative action program. The purpose of the program is to achieve

"a minimum goal of 25% minority employment in the industry . . . by June 1, 1979" (¶ 7), although the following paragraph states that this level "is not an inflexible quota but an objective" (¶ 8). To achieve this goal, the agreement provides that all minorities currently in Group III are to be moved up immediately to Group I (¶ 9); that regular situation positions are to be filled exclusively from Group I by seniority (¶ 10); that for each regular situation filled, one Group III deliverer will move up to Group I, alternating between the most senior minority and most senior nonminority (¶ 11); and that Group III vacancies are to be filled with three minorities for every two nonminorities (¶ 15). Various other provisions establish slight variations for certain employers (¶¶ 12-13), impose some special one-time rules (¶ 14), limit transfers (¶¶ 18-19), and require the Union to offer membership to anyone in Group I (¶ 20).

Finally, section D of the agreement, entitled "general provisions," require employers to help qualified individuals apply for employment (¶ 28), regulates employment applications (¶ 29), requires compliance reports (¶¶ 30-31), provides for backpay to certain members of the class (¶¶ 37, 39), and provides for continued jurisdiction in the District Court (¶ 4). The only provision in section D that arguably contemplates the termination of the agreement is paragraph 33, which states that inconsistent provisions in collective bargaining agreements are suspended, but "may be put into effect when the order terminates, unless the Court orders otherwise."

By 1979, minority employment was only 13.3 percent, and Judge Pierce ordered the office of the Administrator extended for another five years. *Patterson v. Newspaper & Mail Deliverers' Union*, 23 Empl. Prac. Dec. (CCH) ¶ 31,001 (S.D.N.Y. 1980). In 1984, the office was extended on an indefinite basis. In 1985, the defendants moved to terminate the order embodying the settlement agreement on the ground that the 25 percent goal had been reached. In 1987, Judge Conner, to whom the case has been reassigned, found

that while some employers had reached 25 percent minority employment, the goal of the settlement agreement was industry-wide minority representation of 25 percent. Judge Conner deferred further consideration of the motion until there was sufficient evidence that this goal had been attained. In November 1988. Judge Conner concluded that there was sufficient evidence to suspend operation of the two ratios in the affirmative action program (*i.e.*, the 50 percent quota for filling Group I vacancies and the 60 percent quota for filling Group III vacancies) pending resolution of the motion.

In May 1991, the Interim Administrator submitted a report finding an industry-wide fig. e of 28.53 percent and substantial compliance by most employers. After the plaintiff's declined to challenge this figure, the District Court scheduled a hearing on vacating the entire order. The private plaintiff's opposed vacation of any part of the decree. EEOC did not oppose termination of the affirmative action program, but argued that paragraphs 1, 2, 20, 28, 29, 33, and 41 of the settlement agreement should be retained.

In a comprehensive opinion dated July 8, 1992, Judge Conner concluded that the order should be vacated in its entirety. He ruled that modern cases have established a flexible standard for vacating consent decrees, and that this standard allowed termination of a decree once its primary purpose had been attained. He rejected the private plaintiffs' argument that the decree had to remain in force until every facet of discrimination was eliminated, and rejected the EEOC's argument as a "cut and paste approach." Plaintiffs filed a motion to amend the judgment under Fed. R. Civ. P. 59(e), which was denied. However, the District Court modified its earlier order so as to allow discrimination claims filed with the Administrator prior to July 8, 1992, to be processed.

Discussion

I. *Legal standard for modification of a consent decree*

EEOC primarily contends that the District Court erred in applying a flexible standard for modification of the consent decree instead of applying a more rigorous standard. The rigorous standard urged by EEOC dates from *United States v. Swift & Co.*, 286 U.S. 106 (9132), in which the Supreme Court held that an antitrust consent decree could not be modified unless the defendant showed that the dangers leading to implementation of the decree had become "attenuated to a shadow," *id.* at 119. The Court also held that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.*

The adoption of a more flexible standard was intimated in *United States v. United Shoe Machinery Corp.*, 391 U.S. 241 (1968), in which the Supreme Court cautioned that the "grievous wrong" standard should not be read out of context, and allowed the United States to obtain modification of an antitrust injunction in order to strengthen restrictions on the defendant. The seminal case actually applying a more flexible standard is *New York State Association for Retarded Children, Inc. v. Carey.*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). Judge Friendly's opinion read *Swint's* "grievous wrong" language as limited to the special facts of that case, and found that the appropriate standard, at least in an institutional reform case, was one of flexibility, leaving to the District Court a "rather free hand," *id.* at 970. Two recent Supreme Court cases have held that district courts erred in applying *Swift*, rather than a more flexible standard, to the modification of consent decrees or injunctions in institutional reform cases. In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), the Court held that a finding that a school district was operating constitutionally and unlikely to return to its past ways mandated the termination of a desegregation order. In *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992), the Court held that any showing of a significant

change in factual conditions or law would justify a modification of a decree enjoining double bunking and requiring officials to build a new prison; the Court remanded for consideration of whether an upsurge in prison population had been unforeseen.

In the pending case, the District Court rejected EEOC's contention "that this case is governed solely by . . . *Swift*", 797 F.Supp. at 1179, and looked to the flexible standard of *Dowell* and *Rufo*. In an important footnote, Judge Conner noted that though the flexible standard had previously "only been invoked in cases where the conduct of a governmental facility or operation was being regulated," the present case sufficiently implicated "the public's right in seeing that persons are not deprived of fundamental rights" to come within the "institutional reform exception." *Id.* at 1180 n.8.

EEOC is probably correct that the District Court's decision is the first to explicitly adopt the flexible standard of *Dowell* and *Rufo*, rather than the rigorous standard of *Swift*, in a case not involving a governmental entity. It is also true that the recent Supreme Court cases have each, to an extent, invoked federalism and democratic rule concerns as a justification for their use of a flexible standard in the context of institutional reform litigation, *see Rufo*, 112 S.Ct. at 758-59; *Dowell*, 111 S.Ct. at 637. But *New York State Association* makes a more general argument for the flexible standard, based on the difficulties in implementing any complex decree in the institutional setting, *see*, 706 F.2d at 969-70, and the discussion of *Swift* in each of the leading cases, as well as in *United Shoe*, suggest that *Swift* is a special case that should not be read as setting down a general standard for all future cases. *See Rufo*, 112 S.Ct. at 758 ("Our decisions since *Swift* reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."); *Dowell*, 111 S.Ct. at 636; *United Shoe*, 391 U.S. at 248; *New York State Association*, 706 F.2d

at 968-69. Moreover, we have suggested in a post-*Rufo* decision, *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632 (2d Cir. 1992), that *Rufo* constitutes a wholesale change, not limited to institutional reform cases. *See id.* at 636-37 (citing District Court decision in this case for approval).

Among other circuits, there appears to be some dispute as to the appropriate standard for modifying consent judgments. The Seventh Circuit has flatly declared that *Rufo* gave the "*coup de grace*" to *Swift*, noting that although *Rufo* involved institutional reform litigation, the 'flexible standard' . . . is no less suitable to other types of equitable case." *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993). Three circuits have said that *Swift's* strict standard has been relaxed in institutional reform litigation, *Lorain NAACP v. Lorain Bd. of Education*, 979 F.2d 1141, 1149 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 799 F.2d 558, 562 (Fed. Cir. 1992); *Epp v. Kerrey*, 964 F.2d 754, 756 (8th Cir. 1992), but two of these courts have not considered the appropriate standard in public issues litigation not involving a governmental entity, *see Lorain NAACP*, 979 F.2d at 1149; *Epp*, 964 F.2d at 756, and one merely declined to apply the flexible standard to traditional commercial litigation, *W.L. Gore*, 977 F.2d at 562.

We agree with Judge Conner that the flexible standard outlined in *Dowell* and *Rufo* is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity. The "institution" sought to be reformed need not be an instrumentality of government. If a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective. Decrees in this context typically have effects beyond the parties to the lawsuit, as is true of the provisions for affirmative action

remedies in this case. Though it is important to make sure that agreements in such litigation are not lightly modified, it is also important to enter into constructive settlements so that protracted litigation can be avoided and useful remedies developed by agreement, rather than by judicial command. There is an inevitable tension between the objectives of promoting adherence to agreements and of fostering a climate in which constructive settlements may be readily reached. For plaintiffs, the certainty that an agreement will be enforced without modification is an incentive to negotiate a settlement that achieves some, though not all, of what might have been obtained in litigation. For defendants, however, it is the prospect of modification as circumstances change or objectives are substantially reached that provides the incentive to settle on reasonable terms, rather than adamantly resist in a protracted litigation. The tension between these competing objectives cannot be eliminated, but it can and should be sensitively adjusted by courts of equity, exercising their historic powers both to provide remedial relief and, when appropriate, to terminate their authority. We therefore agree with Judge Conner that it was appropriate to apply a flexible standard in determining whether to dissolve the decree.

2. *Application of the standard*

In considering the District court's decision to vacate the entire decree, it will be convenient to focus initially on the affirmative action provisions of the decree. Only the LDF contends that these provisions should be retained. LDF does not dispute that minority representation has reached 25 percent, nor even the District Court's finding that minority representation is likely to increase since many white employees with regular situations are near retirement age and the Group I and Group III lists contain greater than 25 percent minority representation. LDF also does not dispute that it would have been proper to suspend the fixed quotas had the defendants achieved the 25 percent goal by 1979. But LDF contends that the defendants' failure to meet that

goal by 1979 requires (a) setting a new goal now, commensurate with the percentage of minorities in the qualified workforce, and (b) retaining the hiring quotas until the new goal is met. LDF states that the 1980 census showed that minorities constituted 42 percent of the workforce, and that the 1990 census shows a figure of more than 50 percent.

LDF relies on *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), in which the Sixth Circuit reversed the termination of a consent decree and remanded to the District Court for further consideration of whether a higher affirmative action goal should be set after the defendant failed to meet the goal within the deadline set in the decree. The decree in that case stated that it was intended to achieve a "workforce composition which will not support any inference of racial discrimination in hiring." *Id.* at 961. The consent decree in this case could perhaps be read to support a similar goal. The decree states that it is intended to remedy a "statistical imbalance," and it is clear that the 25 percent figure was chosen with reference to the 1970 census figure of a 30 percent minority workforce. Nevertheless, the decree does not suggest that its purpose is to achieve total parity, and the 25 percent figure, as a numerical goal, is stated in absolute terms, without any suggestion that it is subject to modification. Indeed, the decree suggests that if any factor is flexible, it is the time limit. Paragraph 6 allows extension of the office of Administrator beyond five years, and paragraph 8 states that the 25 percent goal "is not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources of the defendants hereto in a good faith effort to maximize employment opportunities for minorities." Both the difficulty of achieving 25 percent goal and the likelihood that the percentage of minorities in the blue collar workforce would increase were foreseeable in 1974. Whether or not the District Court might have had discretion to raise the 25 percent figure as a remedy for not meeting it is originally

contemplated, the Court was surely entitled to conclude that such an increase was not required. Finally, with no increase in the percentage goal, it was proper to dissolve the 50 percent quota for promotions from Group III to Group I and the 60 percent quota for listings in Group III.

Once the District Court decided that achievement of the 25 percent goal justified elimination of the affirmative action provisions, without any increase in the percentage, it then had to decide whether to vacate the entire decree. Though other portions of the decree provide the plaintiff class with enforcement mechanisms for redressing any ongoing discrimination that may be more expeditious than the initiation of new litigation, we agree with Judge Conner that the decree has served its purpose, and that all of its provisions may be ended. Again, we do not decide that the District Court was required to vacate these additional provisions, only that it was entitled to do so. Application of the flexible standard for modifying decrees in the context of this lawsuit seeking broad remedies to change hiring practices entitles a court of equity to focus on the dominant objective of the decree and to terminate the entire decree once that objective has been reached.

Affirmed.

Docket Nos. 92-7964, 6242

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, ROLAND J. BROUSSARD; ELMER STEVENSON, on their own behalf and on behalf of all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellants,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees.

Filed February 7, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States courthouse in the City of New York on the 7th day of February one thousand and ninety-four.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant JOHN PATTERSON, ET AL.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE, III, Clerk
By:

_____
Carolyn Clark Campbell
Chief Deputy Clerk

Nos. 73 Civ. 3058 and 73 Civ. 4278

Sept. 19, 1974

United States District Court
S. D. New York

JOHN R. PATTERSON, *et. al.*

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

Supplemental Opinion Oct. 11, 1974

MEMORANDUM OPINION AND ORDER

PIERCE, District Judge

This memorandum approves a settlement reached by all of the parties after a four-week trial on the merits of two consolidated actions charging employment discrimination in the newspaper and publication delivery industry in the New York City area. The provisions of the agreement are intended to achieve a 25% minority[1] employment goal in the

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[1]"Minority" as it is used in this Settlement Agreement refers to the definition of that word by the Equal Employment Opportunities (continued...)

industry within five years. At the present time, minority employment in the industry is less than 2%; the comparable percentage of minorities in the relevant labor force in the New York City area is approximately 30%. The agreement also provide for supervision of hiring practices and employment opportunities in the industry to the benefit of both minority and non-minority workers.

One of the actions has been brought by the Equal Employment Opportunity Commission (EEOC) and names as defendants the Newspaper and Mail Delivery Union of New York and Vicinity (the Union), the New York Times (Times), the New York Daily News (News), the New York Post (Post) and some fifty other publishers and news distributors within the Union's jurisdiction. The other action is a private class action on behalf of minority persons. Both actions charge that the Union, with the acquiescence of the publishers and distributors, has historically discriminated against minorities and that the present structure of the collective bargaining agreement combined with nepotism and cronyism and other abuses in employment and referral practices, have perpetuated the effects of the past discrimination, in violation of 42 U.S.C. § 2000 *et. seq*. (Title VII). Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in this industry but for the alleged discriminatory practices.

Both actions were filed in 1973. After months of negotiation, the parties reached a settlement agreement in early 1974 but it was rejected by vote of the Union's membership. Following another abortive attempt to obtain ratification from the membership, the two actions were consolidated with each other for a hearing on motions for

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[1](...continued)
Commission and means people who are Black, Spanish-surnamed, Oriental and American Indian.

preliminary relief before this Court. The hearing commenced May 14, 1974. At its conclusion on June 12, 1974, the Court ordered the hearing consolidated with trial on the merits, pursuant to Fed.R.Civ.P. 65(a)(2), giving the parties the opportunity to present further evidentiary submissions or testimony. No further evidence was presented. Instead, the parties having once again entered into settlement discussions, brought before this Court for approval a Settlement Agreement dated June 27, 1974, entered into by all the plaintiffs and all the defendants, and ratified by the Union membership.

A hearing on the fairness, adequacy and reasonableness of the Settlement with respect to the plaintiffs' class was held on August 27, 1974, after due notice to that class. On the same date the Court also held a separate hearing on the legality of the relief provided in the Settlement and its impact on a group of non-minority workers who had, prior to trial, been permitted to intervene in the consolidated actions for the purpose of challenging any affirmative relief which might have affected their interests.

The Standards

As a general proposition, when a settlement agreement is presented to the Court for approval, the Court's role is limited to the exercise of its equitable powers. The Court is not to substitute its judgment for that of the parties. *See, e.g.. Glicken v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y. 1964); *United States v. Carter Products, Inc.*, 211 F. Supp. 144, 148 (S.D.N.Y. 1962). Instead, its role is to assure that the settlement is fair to the class and the parties, and represents a reasonable resolution of the dispute. *See e.g., State of West Virginia v. Chas. Pfitzer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert, denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). Ordinarily, the Court is not expected to examine conclusively into the underlying facts or legal merits of the action. *See, e.g.,*

Newman v. Stein, 464 F.2d 689, 691 (2d Cir.), *cert. denied*, 409 U.S. 1030, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); *United States v. Carter Products, Inc., Supra*, 211 F. Supp. at 148.

But, this is not an ordinary case, it must be recognized that efforts to correct discrimination affect the strongest public sensitivities. The interests involved are far broader than those of the particular parties in a particular lawsuit. Therefore, the parties cannot be permitted to settle for less than, or for more than, the facts of the case and public policy expressed in Title VII mandate. Thus, although the Court is of the opinion that even at this late stage public policy is served by an agreement rather than an adjudication, a more searching discussion of the merit is warranted. In fact, the state of the law in this Circuit may require certain findings of fact to support affirmative action in a Title VII case even when it is resolved by settlement. *See, Ross v. Enterprise Association Steamfitters Local 636*, 501 F.2d 622, 628 n.4 (2d Cir. 1974), explaining *United States v. Wood, Wire and Metal Lathers International Union*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). Further, a more conclusive examination of the merits is necessary in this case because the affirmative action program and the minority goal in principle, and the 25% minority goal are all vigorously disputed by the intervenors.

Inasmuch as this Court has heard a four-week completed trial in these actions, it is in a unique position to find facts and to set forth conclusions of law. Therefore, what follows shall constitute this Court's findings and conclusions to the extent that they form the necessary legal support for the affirmative action proposed.

The Background

Most of the facts are not contested. The Union is the exclusive bargaining agent for a collective bargaining unit encompassing the work performed in the deliverers' departments of newspaper and publication distributors in the

New York area. Its geographic jurisdiction has been variously stated, but it is fair to define it by where the employers in the industry are located: in the metropolitan area of New York City (within a fifty mile radius of Columbus Circle), the New York counties of Nassau and Suffolk, the New Jersey counties of Bergen, Essex, Hudson, Middlesex, Monmouth, Passaic and Union, and the Connecticut county of Fairfield.

The nature of the delivery industry is such that the employers' needs for delivery department employees vary from day to day, and indeed, shift to shift, depending upon the size and quality of the publication(s) being distributed. Thus, each employer by the terms of the Union contract, maintains a regular work force (Regular Situation holders) for its minimum needs, and depends upon daily shapers to supplement the force. By the terms of the contract, at the major employers the shapers are categorized into groups with descending daily hiring priorities. The Group I list of shapers is restricted, by contract, to persons who have at one time held a Regular Situation in the industry. They have first shaping priority at every shift, in order of their shop seniority. After the Group I is exhausted at any given shift, the contract provides that the next hiring priority shall go to Group II members. Group II consists of all persons in Group I and all persons holding Regular Situations in the industry. Once all of the Group II members who have appeared for the shape are put to work, the contract provides that the remaining open jobs, if any, will go to Group III members who have appeared for the shape, in order of their shop tenure.

The shaping system is considerably less structured for the smaller publications and distributors, and, in fact at the this time, only the News and the Times maintain Group III lists of any significant size.

All of the jobs in the industry are within the Union's jurisdiction, whether performed by Regular Situation holders

or by any of the members of the various groups, or any one who shapes at all. The jobs are essentially the same, regardless of the status of the worker who fills them, and are all relatively unskilled. Most workers drive trucks or do floor work. However, because the contract provides that a Regular Situation is a prerequisite to Union membership, only Regular Situation holders and members of Group I and II are Union members.

In theory at least, in addition to structuring the daily hiring priorities, the Group system also represents the priority list for filling Regular Situations as they may become vacant in the newspapers shops.

The Union was founded in 1901, long before the present Group structured contract was in existence. There is no evidence to indicate that at that time it had any minority members (as that term is defined today). Historically it virtually limited membership to the first born legitimate son of a member. The industry had a closed shop and Union members were consistently hired before non-Union men at all industry shapes. In 1952, the industry adopted the contract which included the rudiments of the Group structure described above.

It is abundantly clear that the nepotistic policy of the Union prior to 1952 resulted in discrimination against minorities. *See, e.g., Rios v. Enterprise Association Steamfitters Local 638, supra*, 501 F.2d 622. *United States v. Wood Wire and Metal Lathers International Union*, 328 F. Supp. 429, 432 (S.D.N.Y. 1971). The fact that the Union's intent was not to discriminate against minorities, but to prefer Union members and their sons, does not change the basic conclusion. The effect of such policies, deliberate or not, was to foreclose minorities from employment in the industry. It is the discriminatory *effect* of practices and policies, not the underlying intent, which is relevant in a Title VII action.

The Group structure, instituted in 1952, appears on

its face to discard these discriminatory policies and to open up regular employment opportunities and Union membership to the entire labor force. But, there is uncontroverted evidence that certain relevant provisions of the contract have been administered haphazardly, and that the Group structure has been circumvented by friends and family of Union members. In practice, the fact is that no non-Union Group III shaper in the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group system since 1963.

Testifying at trial, the Union president credibly asserted that the Union was not motivated by any intent to discriminate against minorities, but went on to say that, "I would be the first to admit that we favor and we are partial to our members and I'm not ashamed of that." This attitude is, of course, admirable under most circumstances. There would be nothing unlawful about its effect under Title VII providing that minorities, historically, had been provided free and equal access to Union membership. But the facts indicate that such is not the case here. And even without evidence of abuse of the Group system, the statistics alone reveal the present situation.

There are presently some 4,200 members of the Union, including some 900 pensioners. More than 99% of these Union members are White (non-minority).

There are, at present, a total of 2,855 persons actively working in the industry -- this includes Regular Situation holders (2,460), Group I members (123), and Group III members (272).[2] Of the total in these categories, 70 persons -- 2% are Black, Spanish-surnamed, Oriental or American Indian. Of the 70 minority persons, 28 are scattered among

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[2]Group II is not counted here because Group II is constituted of persons who also hold Regular Situations or Group I positions in the industry. They are permitted by contract to shape in any shop other than their own, in addition to their regular job.

the smaller publishers and distributors; 24 work at the News where the force is approximately 900; work at the Times where the force is approximately 400; and 1 works at the Post where the force is approximately 318.

These figures demonstrate that 20 years after the industry instituted a neutral Group structure of employment and hiring priorities, the participation of minorities in this industry is still grossly disproportionate to the percentage of minority workers in the relevant labor force, which the EEOC suggests is approximately 30%.[3] Even allowing for the fact that the industry has seen many newspapers disappear in these last two decades, with a concomitant loss of jobs, the clear inference from these statistics is that abuses of the Group structure and indeed the Group structure itself, is serving -- however unintentionally -- to "lock in" minorities at the non-Union entry level of the industry, and to thereby perpetuate the impact of past discrimination on the minorities with whom these Title VII actions ar concerned. It is this present impact of past practices which justifies the affirmative corrective relief embodied in the Settlement Agreement. *See, Griggs v. Duke Power Co.*, 401 U.S 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Rios v. Enterprise Association Steamfitters Local 636, supra, United States v. Wood, Wire and Metal Lathers International Union, supra*; *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

The Terms of the Agreement

As with many resolutions of employment discrimination cases, the Settlement Agreement in these actions contains general provisions permanently enjoining the defendants from discriminatory practices in violation of Title VII. And, like the judgment in *Rios*, 360 F. Supp. 979 (S.D.N.Y. 1973) and the agreement in *Wood, Wire* (68 Civ.

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[3]See p. 593 [pp. 28a-29a of this Appendix].

2116, S.D.N.Y. Feb. 25, 1970), this Settlement Agreement sets forth a minority employment goal. In this case, it is for 25% minority employment in the industry within five years.[4] But, unlike *Rios* and *Wood, Wire*, this Settlement Agreement does not merely commit the parties to the future development of a plan to achieve that goal. Instead, it sets forth a plan with great specificity, including variations on the general theme to account for varying circumstances between different employers. Such detail indicates that the plan is the result of hard, serious and good faith negotiations, and that the different pressures, perspectives and interests of the parties have been confronted and already resolved. This serves to increase the Court's confidence that the plan is workable, and can be implemented immediately.

The plan is built upon the outline of the present Group priority structure of the collective bargaining agreement. It provides for an administrator whose duties include not only close supervision of the plan, but also of employment opportunities in the industry on behalf of all workers. Its major features include elimination of past abuses of the Group system; elimination of the contract provision which restricted Group I to former Regular Situation holders; provision for an orderly flow of Group III shapers -- alternating one minority person with one non-minority person -- into steady and secure employment in the industry, first as members of Group I and from there, as Regular Situations become vacant, to Regular Situations. Union membership will be offered to each Group III worker as he reaches the bottom of Group I. The plan further provides that until the 25% minority employment goal is achieved, employers shall hire, at the entry level, three

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[4]The parties have defined "employment" as encompassing Regular Situations and Group I positions. Their view is that a place in either of these two groups represents a steady, secure job in the industry. The Court agrees, at this time. The definition is subject to revision by terms of the Settlement Agreement.

minority persons for every two non-minority persons. In addition, minorities who are presently active on Group III at the News and the Times will immediately move to the bottom of the Group I list, with an equal number of non-minorities to immediately follow them into the Group I list. These minorities will be given pension benefits they would have earned but for the disadvantages they have encountered. With the same purpose, funds have been established by the defendants to provide back pay awards chiefly to these persons.

The Intervenors' Objections

The Group III list the News numbers 178. Scattered throughout the list, in terms of tenure, are 13 minority persons. the intervenors purport to speak for the other 165 persons on the list, and more broadly for all non-minority, non-Union workers in the industry.

Most of the provisions of the Settlement Agreement are applauded by the intervenors, as well they might be. By regulating employment opportunities in the industry, unlocking Group III and Group I, Regular Situations and Union membership, the Agreement will operate beneficially for the intervenors as well as for the minorities.

The focus of their objection is on the order of the flow from Group III to Group I. They assert that the flow ought to be in strict order of tenure on Group III. To immediately move all of the present Group III minorities to the Group I list ahead of some non-minorities who have been listed for a longer period of time on Group III, they assert, is to engage in "leap-frogging" not intended by Title VII. Further, they argue, that the system becomes even more onerous when the provisions for alternating minority /non-minority elevation to Group I go into effect, because after the few minorities who have any tenure in the shop are moved to Group I, the employer will be required to move minorities with no tenure at all ahead of some present

Group III non-minorities.

The facts selected by the intervenors in support of their objections are so. And, at first glance their frustration and anger with this Settlement Agreement is understandable, and their solution is appealing. These intervenors from Group III, as individuals, have also suffered the effects of the Union's nepotism; they have also attacked the present practices and abuses in other forums, under different statutes. Certainly this Court does not accept the argument that these particular men have benefited from a discriminatory system.

But, on deeper examination of the Settlement Agreement and the intervenors' objections, there are a number of reasons why this Court does not and indeed can not, view the intervenors as raising countervailing considerations of such a substantial nature as to preclude approval of the plan.

First and dispositive of all the issues raised by the intervenors, the Settlement Agreement simply does not trample on their employment opportunities. In the long run, it must be acknowledged by all concerned that the effect of this Agreement, if it operates as predicted, will be to achieve Regular Situation or Group I status for all members of Group III, minority and non-minority alike, within a relatively short time-span. Without this Settlement, Group III workers had little if any hope of ever achieving either status under the present system. The intervenors do not contend otherwise. Instead, their objections deal in the main with interim measures which do, in fact, move some minorities faster than some non-minorities. But it must be noted that once a Group III non-minority is elevated to Group I, his daily shaping opportunities will be no less than they presently are and indeed they may be greater. The News projections submitted to this Court indicate that within a month after implementation of the plan, the non-minority who is number 47 on the Group III list, and all non-

Minorities above him, will have been elevated to Group I. The progression thereafter is expected to be approximately 27 non-minority persons to Group I each year. Also the Settlement Agreement provides other benefits to Group III non-minorities, not the least of which is the appointment of an administrator who is empowered to assure that existing work opportunities in the industry shall be made available to any Group III person unable to get at least 45 shifts of work in any calendar quarter.

Further, even if the Settlement Agreement did not provide non-minorities with these benefits, the intervenors' position is not factually or legally sound. Their premise is that the Settlement Agreement will oust them from what they perceive as vested seniority rights in their Group III order. If, in fact, this Settlement Agreement affected firm and realistic seniority rights and expectation of innocent non-minority workers, there could be doubts as to the validity of the relief afforded. *See e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d at 661. But in this case, regardless of the priority structure of the present contract, and the language which may be used in it the fact remains that Group III workers do not have full-time employment, nor do many of them have any great expectations or intention of working full-time while they shape from the Group III list. They are shapers. And, to the extent that the present contract structure, in theory, gives them certain priorities, by tenure on Group III, to achieve Regular Situations, the facts have demonstrated that they could not have any realistic expectation of such movement actually occurring. As noted above, no Group III worker has moved up the list to a Regular Situation since 1963.

Their expectations with respect to daily shape priorities must be viewed in a somewhat different light. Then an additional person is placed in front of a shaper, theoretically his chances of working any particular shift are decreased by a factor of one job. This, of course, depends on the stability of the total number of jobs available from

shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise. The Court does not mean to minimize a Group III member's vested emotional interest in his position at a shape, but it cannot be equated with the worker who might be "bumped" from a steady and seemingly secure position by an outside minority with less seniority than him. Further, it must be pointed out that even if these shaping priorities were viewed as providing firm expectations, "[such] seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." *United States v. Bethlehem Steel Corp, supra*, 446 F.2d at 663. Indeed, the intervenors themselves recognize this principle when they approve of many changes made in the collective bargaining agreement by the proposed Settlement.

Also, it must be said that the relief the intervenors suggest, which would observe strict tenure of the Group III list, would most likely not provide the relief mandated by Title VII for minorities. Given the fact that the active work force at the News numbers 900 and includes only 24 minority persons, it would clearly take a far longer period of time to reach a goal of 25% minority employment. Because the minority percentage is so low, the same objection holds true if, as the intervenors have suggested, the Group I and Group III lists were dovetailed by shop tenure.

Finally, it must not be forgotten that this is a Title VII case. Such cases, as Judge Frankel has said in *Wood, Wire* are launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment. . . . [a]nd we know that, in addition to the spiritual wounds it inflicts, such discrimination has caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972). Title VII

is an expression of a commitment to correct *minority* employment discrimination and, hopefully, the vast social consequences that flow from it and afflict the whole of the nation. The statute does not undertake to correct all forms of employment discrimination. Thus, to the extent that what the intervenors seek here is relief equal to that afforded minorities, it has no legal foundation, in this case. Under the law, relief here must be limited to victims of the kind of discrimination prohibited by Title VII. *United States v. Bethlehem Steel Corp., supra*, 446 F.2d at 665. There is no evidence and no assertion that the intervenors have been discriminated against on account of race, religion, color, sex, national origin, or because they have made charges, testified, assisted or participated in any enforcement proceedings under Title VII.

The 25% Minority employment Goal

There remains the requirement of *Rios v. Enterprise Association Steamfitters Local 638, supra*, 502 F.2d 622, for reliable factual support for the 25% goal. All of the parties have agreed to the figure. The EEOC has based its conclusion on relevant labor force statistics contained in the tables published by the United States Department of Commerce in a publication entitled *General Social and Economic Characteristics*, 1970 Census of Population, for the relevant geographic areas of the Union's jurisdiction. Using what this Court agrees is the most reliable profile possible of the candidate for deliverers' work, the EEOC has extracted figures for Black males over 16 years of age with a high school diploma or less. With considerable ingenuity, the agency has also extrapolated comparable figures for minorities other than Black. Added together they indicate that the relevant labor force is 30% minority. Although the private plaintiffs and the intervenors have submitted other calculations and bases with respect to minority representation in the relevant labor force, in this Court's view the EEOC analysis is the soundest and provides ample support for the 25% minority goal included in the Settlement

Agreement.

Conclusion

This Court has found that the affirmative relief provided in the Settlement Agreement is justified by the facts of this case. It has found that the 25% minority goal is supported by reliable statistics. It has found that the affirmative relief provides members of the plaintiffs' class and other minorities with an adequate, fair and reasonable route to their "rightful place" in this industry and that the Settlement Agreement is enforceable, legal and in the public interest. The Court has also found that the Settlement Agreement does not so interfere with the rights of the intervenors as to require disapproval.

Therefore, the motion of the parties for approval of the Settlement Agreement is hereby granted. Settle Order, upon the consent of the parties endorsed thereon by their attorneys, accordingly.

So ordered.

SUPPLEMENTAL OPINION and ORDER

On September 19, 1974, this Court filed a Memorandum Opinion and Order approving the proposed settlement of these actions. As part of that settlement the parties agreed to the appointment of an Administrator to supervise its implementation. While they agreed that the Court would appoint a person of its own choosing, they indicated a preference for a particular individual whose reputation as an experienced person in labor-management relations is undisputed.

This Court is mindful that given the context of a suit pursuant to Title VII of the Civil Rights Act of 1964 experience in labor-management relations is not without significant value to an Administrator. But this is not to say that under all circumstances an Administrator in a Title VII action must be recruited from the ranks of the labor-

management specialists. There are instances, and the Court believes this to be one of them, when other qualities may assume greater importance in meeting the commitment to the broad social policies which underpin the 1964 Act.

The Administrator appointed in these consolidated actions will be charged with the responsibility of seeing that the terms of the Settlement Agreement under Title VII of the Civil Rights Act of 1964 are diligently and conscientiously implemented. This Act was designed primarily to protect, and provide a more effective means to enforce, the civil rights of persons within the jurisdiction of the United States. It aims, inter alia, to eliminate discriminatory practices by business, labor unions, or employment agencies and thereby to encourage the growth of economic opportunities for minority individuals, thus strengthening the economic foundation essential to the full enjoyment of civil rights. When President Lyndon B. Johnson signed the 1964 Act he declared that its overriding social goal was "to promote a more abiding commitment to freedom, a more constant pursuit of justice and a deeper respect for human dignity."

In light of these broad national purposes, this Court considers it of paramount importance that the Administrator it appoints here possess a finely tuned sensitivity to the social impact of past discriminatory employment practices, and a balanced sense of dedication and commitment to the elimination of these practices.

Further, while in some cases the very nature of the industry in which the Settlement Agreement is to operate and the unusual complexity of its labor-management problems may dictate the appointment of an individual with a background in labor-management relations, such is not the case here. Here, the Court is concerned with an important but relatively small and centralized industry involving the delivery of newspapers, magazines, books, etc. The bargaining unit of the Newspaper and Mail Deliverers'

Union encompasses only about 3,000 employees most of whom are employed by the three major newspapers in the New York City metropolitan area. Given these characteristics, this Court finds that experience in labor-management relations need not be the major consideration which should guide the Court in its appointment of an Administrator.

This finding is buttressed by the fact that the Settlement Agreement here is quite detailed and specific. Were such an Agreement broad in its terms, the Administrator would be faced with the need to establish procedures, define specific objectives, and develop the methods to be employed. In such an instance, an Administrator with an extensive background in labor-management work and possibly even familiarity with the industrial unit involved would seem to be indicated. In contrast where the Settlement Agreement is highly detailed, as here, the responsibilities of the Administrator are clearly defined and consequently, his discretion is accordingly more circumscribed and the need for a particular expertise becomes correspondingly less important.

Not to be disregarded, of course, in appointing an Administrator is the assessment of the proposed Administrator by the parties. Since their respective interests clearly will be affected by the Court-appointed Settlement Agreement, there should be some assurance that there is confidence in the person to be appointed. In this case, the proposed Administrator is said to be completely satisfactory both to the private plaintiffs and to the EEOC. While it is true that the defendants have not expressed like sentiments, their reservations are centered on the proposed Administrator's lack of experience in labor-management relations. But, as the Court has already indicated, such experience while frequently desirable and even essential should not always be the prevailing consideration. Sensitivity to the broad social purposes of civil rights legislation and the disposition to fairly and adequately administer the agreement

are qualities which in this Court's view, in this case outweigh whatever lack of expertise may exist. Further, the parties herein have demonstrated a commendable spirit of cooperation which the Court confidently expects will continue during the implementation state of these proceedings. To that extent the Administrator's task will be made immeasurably less difficult.

Having carefully considered the matter in light of the principles briefly discussed above and after a careful review of a number of qualified men and women who might be available for appointment, the court has decided to appoint the person named in the Court's letter of September 11, 1974 as the Administrator.

It is so ordered.

No 73 Civ. 3058
No. 73 Civ. 4278

Filed October 25, 1974

United States District Court
Southern District of New York

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

JAMES LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, *et al.*,

INTERVENORS.

FINAL ORDER AND JUDGMENT

Upon the consent of the parties, endorsed hereon by their attorneys, and upon the Settlement Agreement between the parties, dated June 27, 1974, and attached hereto as Exhibit A, and upon this Court's Memorandum Opinion and Order approving the Settlement Agreement, dated September 19, 1974, and upon this Court's Supplemental Opinion and Order, dated October 11, 1974, appointing William S. Ellis, Esq., as the Administrator, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The Settlement Agreement is hereby approved as a basis for settlement of these actions and the defendants in these actions, including those in default, are hereby directed to implement and perform the Settlement Agreement in accordance with its terms and with the provision of this Order and Judgment.

2. Failure to comply with this Order and Judgment, including breach of the Settlement Agreement, shall be punishable as a contempt of court.

3. A copy of the Settlement Agreement and of this Order and Judgment shall be kept available and displayed by all defendant employers in a permanent place where notices to their delivery department employees are usually posted and by defendant union in a prominent place at the union's offices.

4. This Order and Judgment and the Settlement Agreement shall be binding upon plaintiffs and all members of the class or classes they represent, and defendants and their officers, agents, servants, employees, assigns, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

5. William S. Ellis, Esq., is hereby appointed as the Administrator under the Settlement Agreement, and he

shall be compensated at an hourly rate of $65.00 plus expenses.

6. This Court's temporary restraining order of March 19, 1974, extended by consent of the parties on April 5, 1974, until the entry of this final order, is dissolved as of the effective date of this Final Order and Judgment.

7. These actions are hereby marked "settled," with prejudice and the Court hereby retains continuing jurisdiction over these actions for the purpose of the enforcement of compliance with this Order and Judgment and the Settlement Agreement and the punishment of violations thereof, and for the purpose of enabling any of the parties to apply to the court for such further orders and directions as may be necessary or appropriate.

8. This Order and Judgment shall take effect on November 11, 1974, and any application to the United States District Court for a stay thereof shall be made in writing and not later than October 29, 1974, at 10:00 O'clock a.m.

Dated: New York, New York

October 24, 1974.

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United States District Judge

No. 626

Docket No. 74-2548
Argued Jan. 9, 1975
Decided March 20, 1975

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants-Appellees

DOMINICK VENTRE, *et al.*,

Intervenors.

Before: FEINBERG, MANSFIELD and OAKES, Circuit Judges

MANSFIELD, Circuit Judge:

At issue on this appeal is the appropriateness of relief against discrimination in the employment of news deliverers. In the past we have been called upon to review relief granted in cases where discrimination has been established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, including the use of minority percentage goals and affirmative hiring and promotion programs. *See, e.g., Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). The present appeal presents several variations on the theme. Unlike previous cases the affirmative relief under attack here does not result from an order of the district court entered after a determination of the merits of the action but from a settlement agreement between the plaintiffs, who are minority persons seeking employment as news deliverers, the defendant Newspaper and Mail Deliverers of New York and Vicinity ("the Union" herein), and the Government. The settlement was reached after a four-week trial in the Southern District of New York before Lawrence W. Pierce, Judge, who approved the agreement. The person challenging the relief is not an aggrieved minority employee but a white non-union worker, James V. Larkin, who, having been permitted to intervene, seeks to set aside the agreement as unlawful on the ground that it affords benefits to minority

workers[1] not given to similarly situated white workers, regarding the advancement rate and diluting the work opportunities of these white workers.

Because he had heard a four-week trial in this case and because of the public interest involved in a Title VII action. Judge Pierce considered in a thorough opinion the merits of the plaintiffs' action and the conformity of the settlement to the goals of Title VII and the rights of the parties. *See*, 384 F.Supp. 585 (S.D.N.Y. 1974). We find no abuse of discretion in Judge Pierce's approval of the settlement and therefore affirm.

The appeal arises out of the two consolidated actions. One was brought by the Equal Employment Opportunity Commission against the Union, the New York Times ("Times" herein), the New York Daily News ("News" herein), the New York Post ("Post" herein), and about 50 other news distributors and publishers within the Union's jurisdiction. The other is a private class action on behalf of minority persons. Both complaints allege historic discrimination by the Union against minorities, and charge that the present structure of the Union's collective bargaining agreement and the manner of its administration by the Union perpetuate the effects of past discrimination in a manner that violated Title VII. The defendant publishers are alleged to have acquiesced in these practices. Appellant Larkin is one of approximately 100 white non-union "Group III" workers at the News who are given permission to intervene under F.R. Civ. P. 24(a)(2) because of their potential interest in the relief to be fashioned.

The Union is the exclusive bargaining agent for the collective bargaining unit which embraced all workers in the delivery departments of newspaper publishers and of

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[1]The term "minority" as used herein means persons who are Black, Spanish-surnamed, Oriental and American Indian. "White" or "non-minority" refers to all other persons.

publications distributors in the general vicinity of New York City, including, in addition to the city proper, all of Long Island, northeastern New Jersey counties, and north to Fairfield County, Connecticut. Of 4,200 current Union members, 995 are white.

Due to variations in the size and quantity of publications to be distributed, the needs of distributors for delivery personnel vary from day to day and from shift to shift. For that reason the work force in the industry is separated by the Union agreement into (1) those holding permanently assigned jobs ("Regular Situations") and (2) those called "shapers," who show up each day to do whatever extra work may be required on that day. The work performed by persons in both categories is unskilled. Shapers are divided into four classifications, Group I-IV. the order in which shapers are chosen for extra work on each shift is determined according to Group number and by shop seniority of members within each group.

Group I, the highest priority group, consists solely of persons who once held Regular Situations in the industry. Each employer maintains his own Group I list, which is comprised of persons who have been laid off from Regular Situations at other employers, or who have voluntarily transferred from Regular Situations or from classifications as Group I shapers at another employer. When a Regular Situation becomes available, the highest seniority person on the employer's Group I list is offered the position.

Group II is an aggregate list compiled from the entire industry and consists of all Regular Situation holders and Group I members. Taking priority after Group I is exhausted, it enable regular and Group I members to obtain extra daily work at employers other than their own.

Major employers maintain a Group III list, which consists of persons who have never held a Regular Situation in the industry. Members of Group III are given daily work

priority after Group II. To maintain Group III status, workers are required to report for a certain number of "shapes" each week. Prior to the settlement agreement under review Group III members are theoretically entitled by shop seniority to any Regular Situation that become available, if the Group I list had been exhausted. Group IV shapers are last in priority and are required to appear for a shape far less frequently than Group III shapers.

Although the Union represents all delivery workers, membership is limited to Regular Situation holders and Group I members. Historically the Union has excluded minorities and has limited its membership to the first born son of a member. Aside from the chilling effect which restriction of Union membership to whites might in itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group III lists, even though Group III shapers are not members of the Union. Of 2,855 persons now actively seeking work in the industry (which includes 2,460 Regular Situation holders, 123 Group I shapers, and 273 Group III shapers only 70, or 2.45%, are minority persons.

While the current Group Situation which was adopted in 1952 appears on its face to open Union membership to anyone in the labor force, Union membership, because of lax administration of the contract provisions, has largely remained attainable only by the family and friends of a Union member. Due to artificial inflation of the Group I lists, no person has in practice made the theoretically possible jump from Group III to a Regular Situation since 1963. The evidence suggests that this expansion of the Group I lists has been accomplished primarily by use of voluntary transfers of Group I or Regular Situation holders from the lists of smaller distributors to the Group I lists of more desirable, larger employers, and ultimately to Regular Situations there. Other devices include fictitious lay-offs, enabling the Union member to transfer to Group I of the different employer, and outright false assertion of Group I

status by persons who have obtained Union membership cards, the validity of which have not been challenged by employers.

On the basis of this evidence, which was largely uncontroverted, Judge Pierce, in approving the settlement, had no difficulty concluding that the Union's practice amounted to a violation of Title VII, since they served to "'lock-in' minorities at the non-union level of entry in the industry, and thereby to perpetuate the impact of past discrimination . . . ," conclusions that appear fully justified by the record and are not challenged here. *See, Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Rios v. Enterprise Assn. Steamfitters, Local 638, supra*; *United States v. Wood, Wire & Lathers, Intl. Union, Local No. 46*, 471 F.2d 406 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); *United States v. Bethlehem Steel Corp., supra*.

The settlement agreement reached by the parties provides that the Union shall be permanently enjoined from discriminatory practices in violation of Title VII. It establishes an administrator to insure compliance with the terms of the agreement, and provides for the elimination of past abuses, primarily by abolishing voluntary transfer by Union members. It establishes a minority hiring goal of 25%, specifies a procedure for attaining that goal, and provides for back pay to minority workers. Most of these provisions are not challenged by Larkin.

The 25% goal is to be reached throughout most of the industry by requiring that all incumbent minority persons on the Group III list of each employer as of the date of entry of the order are to be moved immediately to group I. All new persons hired in the industry and classified in Group III will be employed according to a ratio of three (3)

minority[2] persons to two (2) non-minority persons. As each Regular Situation is filled by a Group I member, one Group III member shall be moved to Group I and offered Union membership. This is to be done on an alternating one-for-one basis between minority and non-minority workers. Each two vacancies in Group I will thus be filled by the minority worker in Group III having highest seniority and the highest seniority non-minority worker. The agreement also modifies these provisions insofar as they apply to the smaller employers and to the Daily News, taking into account special conditions affecting each. At the News, an equal number of non-minority persons from Group III will follow those minority workers who move into the Group I list on the date of the order, also, for a certain time, one minority and one non-minority person will replace each person on the Group I list promoted to the Regular Situation.

Larkin's objection to the settlement is premised on the observation that Group III white workers have not benefited from the Union discrimination which is the object of this lawsuit. On the contrary, as Judge Pierce recognized, they also have suffered from Union policies which barred Group III workers from access to Group I and permanent jobs. Upon this premise. Larkin first broadly asserts that because the Group III whites were also discriminated against, they are entitled to the same relief as the minority workers. More specifically, he objects to those aspects of the affirmative action plan which, he asserts, allow minorities to "leap-frog" non-minorities with greater seniority. He also

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[2]Intervenor in addition, suggests procedural infirmities in the court's approval of a plan to which he objected. It is difficult to think of a way in which appellant was denied procedural rights however, since Judge Pierce afforded him a hearing and thoroughly considered his objections.

attacks the 25% goal.[3]

DISCUSSION

The scope of our review of a district court's approval of a settlement agreement is limited. "[T]he appellate court should intervene only on a clear showing that the trial judge was guilty of an abuse of discretion," *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). While the public objective embodied in Title VII warrant a careful review of the provisions of the settlement in light of those policies, *see*, *Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622, 628 n.4 (2d Cir. 1974), the clear policy in favor of encouraging settlements must also be taken into account, *see Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), particularly in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals. Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest, *cf. United States v. Wood, Wire & Metal Lathers Intl. Union, Local No. 46*, 471 F.2d 408, 416 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973), especially in a case like the present one where the settlement was approved and two hearings with respect to the fairness and adequacy of the proposed agreement. Furthermore, unlike appeals from decrees of the district court entered after trial on the basis of findings and conclusions where we may modify the terms

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[3]Intervenor, in addition, suggests procedural infirmities on the Court's approval of a plan to which he objected. It is difficult to think of a way in which appellant was denied procedural rights however, since Judge Pierce afforded him a hearing, and thoroughly considered his objections.

of the decree, *see, e.g., United States v. Bethlehem Steel Corp., supra*, we are powerless to rewrite the provisions of the settlement agreement. Our only alternative, if we concluded that Judge Pierce had abused his discretion, would be to set aside his approval of the settlement and remand the case for completion of the trial. *United States v. Automobile Manufacturers Assn.*, 307 F. Supp. 617 (C.D. Calif.), *affd, per curiam sub nom., City of New York v. United States*, 397 U.S. 246, 90 S.Ct. 1105, 25 L.Ed.2d 280 (1970).

Although Larkin objects to the use of a 25% goal and to Judge Pierce's conclusion that the minority make-up of the relevant part of the labor force is 30%, he does not suggest any alternative or more reliable figures as to the labor force, he merely calls the court's figures "contrived." In contrast to his failure to provide any evidentiary support for his objections, the record reveals that, in concluding that the 25% goal was appropriate, Judge Pierce relied on population figures in the Department of Commerce's publications, *General Population Characteristics -- 1970 Census of Population and General Social and Economic Characteristics, 1970 Census of Population* and took into account the relevant geographic area and demographic characteristics of those making up the news delivery work force. Thus, his conclusion, laid down in *Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974), was adequately based.[4]

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[4]Intervenor also suggests that his rights under 42 U.S.C. § 2000e-2(j) have been violated. The section provides in pertinent part.

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of race color, religion, sex, or

(continued...)

Larkin's argument that he is entitled to the same benefits as the minority workers must also be rejected. This case arises under a statute which by its terms is limited to protection against employment discrimination based on an individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Larkin does not allege discrimination against him based on any of these factors. He argued only that the industry's part practices discriminated against all Group III members, minority and non-minority, and that while the settlement agreement remedies the discrimination against minority persons it fails to afford any relief for the harm caused to non-minority persons. Worse still, he asserts, the relief to minority persons is at the expense of the white Group III workers.

At first glance this argument has much appeal. As the district court recognized, Group III workers were the victims of some practices that were harmful to all Group III

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[4](...continued)

> national origin of such individual or group o account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."

It is well settled in this Circuit that this section does not preclude the use of racial hiring quotas to remedy the effects of past discrimination. *Rios v. Enterprise Assn. Steamfitters, Local 638, supra*, 501 F.2d at 630-31; *Vulcan Society v. Civil Serv. Comm.*, 490 F.2d 367 (2d Cir. 1973); *United States v. Wood, Wire & Metal Lathers, supra*.

members, regardless of race. Minority members, on the other hand, were the targets of racial discrimination on the part of the virtually all-white Union. In this Title VII action we are limited to consideration of the fairness of relief directed only to the latter. The objective of Title VII is to "attack the scourge of racial discrimination" which has "caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." *United States v. Wood, Wire & Metal Lathers Intl. Union*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *affd.* 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). It creates no rights or benefits in favor of non-minority persons or groups. Any past denial of promotion rights to Larkin is clearly not remediable under Title VII. Indeed, Group III white workers have unsuccessfully sought relief for themselves under other statutes. It is thus apparent that Larkin has no right to any of the affirmative relief afforded to the minority groups, including the back pay provisions.[5] Our review, therefore, must be limited to the question of whether the settlement agreement, in remedying minority discrimination, treats the intervenors fairly. *See State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 401 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

The affirmative-action provisions of the agreement under review affect Group III workers in the industry, and particularly Daily News workers, in two ways. First, the provisions for immediate transfer of incumbent minorities at

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[5]*United States v. Roadway Express, Inc.*, 457 F.2d 654 (6th Cir. 1972) relied on by the intervenor does not suggest otherwise. There the court was faced with a settlement agreement in which the union had agreed to give some benefits to white as well as minority non-union workers. When white union members objected the court refused to invalidate the agreement. The case does not require that a settlement give equivalent benefits to minority and non-minority workers.

major employers to Group I and for the filing of Group I openings by alternately promoting one minority worker and then one non-minority worker from Group III to Group I mean that a white Group III worker will advance to Group I less rapidly than would be possible if straight shop seniority were the basis of promotion. Indeed, a time will shortly come when minority persons not employed in the industry at all on the date when the agreement went into effect may achieve Group I status before many Group III whites with seniority. Although this feature of the agreement is not as beneficial to Larkin as would be promotion on the basis of straight non-minority regardless of race, the agreement nevertheless benefits Larkin. It presents him with an opportunity he never had before: the chance to move up to Group I, and eventually to a Regular Situation. Before, there was in effect no seniority system with respect to promotion into Group I. Thus any plan for advancement of Group III members to Group I could only be beneficial to Larkin. Approval of the plan can hardly be labelled as abuse of discretion because it does not advance Larkin as rapidly as minority persons with less seniority. A reasonable preference in favor of minority persons in order to remedy past discrimination injustices is permissible. *See Rios v. Enterprise Assn. Steamfitters*, 501 F.2d 622 (2d Cir. 1974).

Second, the agreement affects daily work priorities. Its provision that all present incumbent Group III minority workers shall move at once into Group I immediately drops Group III whites in daily priority by whatever number of minority workers of lesser seniority are added to the higher priority Group I. Furthermore, the one-to-one ratio for promotion thereafter of workers from Group III into Group I as openings in Group I become available means that an average non-minority Group III worker will not advance as quickly up the daily priority ladder within Group III as he would under straight raceless seniority. This results from the fact that, whenever two openings in Group I become available, one will be filled by a white worker senior to him

and one by a minority worker of lesser seniority. Thus he moves up only one step for every two Group I openings.

The situation is even less favorable at the Daily News where for an initial period as each Group I opening (rather than two openings) becomes available, the employer will add one minority and one non-minority employee to Group I. The effect of the expansion of Group I to take in minority members of lesser seniority is likely to slow down the rate of advancement of non-minority persons within Group III more than under a one-for-one arrangement limited to an equal number of vacancies in Group I. Of course, in all cases once a Group III white employee reached Group I, he will move up in daily work priority (and priority for a Regular Situation) on the same basis as existed before the agreement.

Appellant characterizes these effects as "leap-frogging" or "bumping" of incumbent white workers, *see United States v. Bethlehem Steel Corporation*, *supra*, 446 F.2d at 659, and argues that we have rejected other affirmative action programs having such an effect. It is true that we have suggested that court ordered relief involving minority employment goals be confined to entry level positions. Thus in *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973), we upheld the imposition of racial hiring quotas at the patrolman's level, the entry level of the police force, but rejected the use of such quotas for promotion to higher ranks. In *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), we simply noted that minority transferees under the court's order would be transferred into job vacancies created in the normal course of business and that no incumbent employee would be "bumped" out of his job. *Id.* at 664. In neither case did we specifically pass on the propriety or fairness of "bumping" an incumbent.

These cases do not support rejection of the agreement that has been reached in this case. The *Bridgeport Guardians* decision was based upon the failure to establish

any discrimination within the promotional system, the proof being limited to discrimination at the point of entry into the police force, *i.e.*, in qualifying for the rank of patrolman. *See* 482 F.2d at 1333-41. In the present case, on the other hand, there has been racial discrimination throughout the industry. Furthermore, even assuming the desirability of confining use of quotas to entry level positions, the effective point of entry into employment in the industry has been at Group I, not Group III. Judge Pierce found that "Group III workers do not have full-time employment, nor do many of them have great expectations or intentions of working full-time while they shape from the Group III list." It is true, as appellant points out, that both Group I and Group III workers must shape regularly and neither has assurance of regular work. But the fact remains that traditionally a worker who reached Group I was on the road to a Regular Situation, whereas one who was in Group III would not progress above that level.

Even assuming that "bumping" of incumbents from their present jobs is inadvisable in an affirmative hiring scheme, it is inaccurate to characterize Group III workers as having been "bumped." They have retained their position: they have not been delisted in favor of minorities. Moreover, we are not dealing with workers who have been steadily employed under conditions where seniority is synonymous with an assured job but with a fluctuating group of shapers competing for a limited amount of work that varies widely from day to day. Although some may have declined somewhat in their daily work priority, as Judge Pierce pointed out, the actual effect of this decline is difficult to gauge since the availability of work at a given shape depends on the stability of the total number of jobs available from shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise." In addition, the number of minority workers promoted to Group I on the date the agreement became effective, which

solely accounts for any decline in daily work priority, is quite small. Only 13 of 178 Group III members at the News were minority persons, 6 of 34 at the Times.

The impact of any dilution of daily work opportunities resulting from the settlement agreement is, furthermore, softened by the fact that all current Group III members will be elevated to Group I within a fairly short time. The News estimates that within a month after implementation of the plan all non-minority workers above 47 on the Group III list will be elevated to Group I and that thereafter about 27 non-minority persons per year will be promoted from Group III to Group I. This suggests that any decline in daily work priority attributable to the promotion of presently incumbent minority workers to Group I will be offset for most workers by a rise in priority within Group III resulting from the expeditious upward movement of Group III whites, also made possible by the program. Finally, should some Group III workers have difficulty finding work, the agreement empowers the administrator to assure that any existing work opportunities in the industry be made available to those unable to get at least 45 shifts of work in a calendar quarter.

Aside from the foregoing, there was evidence from which it could be inferred that, if there had been no racial discrimination in the industry, more minority persons would have been able to enter Group III and to gain seniority over many whites within Group III. Thus, although Larkin has been the victim of a system which excluded Group III members, minority and white, from promotion to Group I, he may well have been the modest beneficiary, vis-a-vis the minority work force, of a policy that discouraged minority persons from entering Group III. To the extent that the settlement may cause a temporary decline in Group III white worker's rate of promotion and daily work priority, it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the "rightful place" on the seniority ladder, which they would have

occupied but for industry-wide racial discrimination.

In any event it must be recognized that rights of the kind Group III workers here assert "are not indefeasibly vested rights but mere expectations derived from a bargaining agreement and subject to modification." *United States v. Bethlehem Steel Corp., supra*, 446 F.2d at 663. Here appellant has applauded those modifications of the collective bargaining agreement that are favorable to him, such as the removal of the provision limiting Group I to former Regular Situation holders. Under the peculiar circumstances that have governed employment in this industry it does not strike us as unfair to impose certain modifications on the manner in which promotions or qualifications for daily work are determined. Job seniority need not be the only standard for determining promotions. Orders requiring that job vacancies be filled by means other than normal routes o internal promotion have been upheld as necessary to remedy past discrimination. *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974); *cf. Allen v. City of Mobile*, 331 F. Supp. 1134, 1142-43 (S.D. Ala. 1971), *aff'd. per curiam*, 466 F.2d 122 (5th Cir. 1973), *cert. denied*, 412 U.S. 909, 93 S.Ct. 2292, 36 L.Ed.2d 975 (1973) (§ 1983 actions), and indeed, affirmative relief displacing white with greater seniority has been granted, *see United States Sheet Metal Workers International Assn., Local 36*, 416 F.2d 123, 133-34 (8th Cir. 1969).

The provisions of the settlement agreement affecting Larkin thus cannot be characterized as illegal or unfair. Whatever disadvantages he may temporarily suffer in terms of daily work priority are offset by the substantial improvement in his long range prospects arising from the opportunity that has been created for the first time, for him to reach Group I and, eventually, Regular Situation status. Judge Pierce therefore did not abuse his discretion in finding the settlement agreement to be fair to Larkin. The order is affirmed.

FEINBERG, Circuit Judge (concurring)

I concur in the result.

This case involves the difficult issue whether a hiring quota based upon race can be legally imposed under the Civil Rights Act of 1964 or the United States Constitution. In the past few years, this court has twice held that such quotas may be utilized to correct past discriminatory practices in public employment. *Vulcan Society v. Civil Service Comm'n.*, 490 F.2d 387 (2d Cir. 1973) (firemen); *Bridgeport Guardians,Inc. v. Civil Service Comm'n.*, 482 F.2d 1333 (2d Cir. 1973), petition for *cert.* filed, 43 U.S.L.W. 3282 (U.S. Nov. 11, 1974) (policemen). We have also permitted such remedial quotas in two cases in which the employment was in the private sector of the economy. *Rios v. Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Wood, Wire & Metal Lathers, Local 46.*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L...Ed.2d 398 (1973).

Nevertheless, I believe a strong note of caution is called for and should be stated. In *Rios*, Judge Hays wrote a powerful dissent, arguing that section 703(j) of the Civil Rights Act, 42 U.S.C. § 2000e-2(j), bars the use of court-ordered racial hiring quotas.[1] He distinguished our

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[1]Section 703(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified by any labor organization, or admitted to, or employed in, any

(continued...)

decisions in *Vulcan Society* and *Bridgeport Guardians* on various grounds, the most persuasive of which was that "there was no other means of affording relief that did not interfere with essential public services" provided by firemen and policemen. 501 F.2d at 638. In both cases, hiring had to continue while new, non-discriminatory employment lists were drawn up. Judge Hays also distinguished *Wood, Wire & Metal Lathers*, because the union there, in accepting a settlement, waived the benefit of section 703(j). A close analysis of the cases in our circuit thus suggests that *Rios* is the only decision squarely holding that a court may impose a racial quota in a private employment case in the absence of a settlement.

Emphasizing the status of the authority in this circuit on the issue is worthwhile because, as we have earlier pointed out, quotas should be approached "somewhat gingerly." *Bridgeport Guardians. supra*, 482 F.2d at 1340. the reason for this is clear: A racial quota is inherently obnoxious, no matter what the beneficent purpose. Such a quota is demeaning and divisive. At best it is a lesser evil. It is not to be encouraged.

However, this case is not an appropriate one for reexamination of the subject. The past discrimination against minority workers here was made quite clear after a four-week trial to the court. Minorities are conspicuously absent from the ranks of Group I and Regular Situation holders even though there are no special skills required to fill the jobs involved. The intervenor asks us to upset a settlement agreement that provides benefits for whites as

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[1](...continued)

apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

well as for minorities. The quota the principal parties have agreed upon is intended to be of short duration. 384 F. Supp. at 590-91. And finally, the intervenor does not direct his main attack against the idea of a hiring quota: he objects to its size and the effect on him and others already in the industry in Group III status.

Under all of these circumstances, I concur in the result.

No. 73- Civ. 3058
No. 73 Civ. 4278

United States District Court
Southern District Of New York
June 10, 1980

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER and MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK and VICINITY, *et al.*,

Defendants,
JAMES LARKIN, *et al.*,

Intervenors.

PIERCE: D.J.:

Various defendants in these actions bring this application for an order modifying the settlement agreement which was entered into by the parties on June 27, 1974 and subsequently approved by this Court on October 25, 1974. The defendant/movants seek now to eliminate the positions of Administrator of the settlement agreement. Under the proposed modification of the settlement agreement, the responsibilities of the Administrator would be performed by the Equal Employment Opportunity Commission and by the Adjustment Board of Hiring Practices, as established under the collective bargaining agreement entered into by the defendant Newspaper and Mail Deliverers' Union and various defendant employers. Before addressing the merits of this application the history of these actions will be reviewed briefly.

History of Actions

These actions were commenced in 1973. Plaintiffs alleged that defendants had engaged in employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* At the conclusion of a four-week trial on the merits, the parties agreed to a settlement of the claims asserted. However, the terms of the settlement agreement were opposed by certain intervenors.

By Memorandum Opinion and Order dated September 19, 1974, this Court approved the settlement agreement. *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, [8 EPD ¶9736], 384 F. Supp. 585 (S.D.N.Y. 1974). It was noted in that decision that the nepotistic membership policy of the defendant union prior to 1952 had resulted in discrimination against minority applicants, since few, if any, members of the union were from minority groups. *Id.* at 589. Indeed, as stated by the Court of Appeals for the Second Circuit on review of the aforesaid decision, "[h]istorically the Union has excluded

minorities and has limited its membership to the first born son of a member." *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, [9 EPD § 10,033], 514 F.2d 767, 770 (2d Cir. 1975). At the time this Court approved the settlement agreement, less than 1% of the members of the union were from minority groups. *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity, supra*, 384 F. Supp. 588.

The settlement agreement entered into by the parties set forth the goal of increasing minority employment in the industry to 25%. To help achieve this goal, the position of Administration of the settlement agreement was established under the express terms of the settlement agreement. Under paragraph 4 of the agreement, the Administrator was "empowered to take all actions . . . as he deems necessary to implement the provisions [of the agreement] and to ensure performance of the Order [approving the settlement]." The terms of paragraph 4 also provided that the Administrator was responsible for reviewing and determining all "complaints that any individual in the bargaining units in the industry represented by NMDU has been allegedly denied equal employment opportunities on the basis of race, color or national origin and [for deciding any questions of interpretation and claims of violation of the Order [approving the settlement] by any party or by any such individual employee or applicant for employment.

Paragraph 6 of the settlement agreement provides that the Administrator shall be designated by the Court and shall remain in that position for an initial period of five years at the conclusion of which he or his successor shall remain in office for such time as this Court directs. Pursuant to that provision, William S. Ellis, Esq. was appointed by the Court as Administrator of the settlement agreement in November, 1974.

In this Court's view, since the date of his appointment, the Administrator has performed his duties

with dedication and has ably and fairly fulfilled his obligations. In his report to the Court dated October 19, 1979, the Administrator indicated that as of April 31, 1979 the percentage of minority employment was 12.16%, slightly less than half the goal set forth in the settlement agreement. That report also lists fifteen pending matters which were before the Administrator as of the date of the report. By letters to the Court dated January 16, 1980, March 10, 1980, and June 3, 1980 the list of pending matters had been updated. As of June 3, 1989, eleven matters were pending.

On November 11, 1979, the initial appointment of the Administrator terminated pursuant to paragraph 6 of the settlement agreement as discussed above. See Order dated October 29, 1979. Thereafter, Ellis was appointed as Interim Administrator pending resolution of the present motion for modification of the settlement agreement. See Order dated November 13, 1979.

Motion for Further Relief and

Modification of Agreement

The defendant/movants seek to eliminate the position of the Administrator and to substitute the EEOC and the Adjustment Board on Hiring Practices as the principal agencies responsible for implementation of the settlement agreement. The Adjustment Board was established by the collective bargaining agreement between the union and two defendant employers, the New York Times, Co. and the New York News, Inc. It is composed of four members of which two members are designated by the union and two members are designated by the Publishers /Association of New York City. The defendant/movants are members of the Publishers Association. Under the collective bargaining agreement, the Adjustment Board is responsible for hearing and determining employment disputes.

Under the proposed plan submitted by the defendant/movants, all complaints would be initially filed with the EEOC. The EEOC would then refer the dispute to the parties for 45 days for voluntary settlement purposes. If no resolution is reached within that time the EEOC should refer the complaint to the Adjustment Board for final and binding resolution. The Board's decision would then be submitted to the EEOC. Any party could then request a plenary review of the Board's decision by this Court.

The principal arguments asserted by the defendant/movants in support of their application are that: (1) the expense of maintaining the positions of the Administrator is high; (2) the EEOC and the Adjustment Board can fulfill the functions of the Administrator; (3) the industry is declining; (4) significant progress has been made toward the achievement of the 25% minority employment goal.

Both the EEOC and the Interim Administrator have responded to the proposed plan in compliance with the request of this Court. The EEOC has indicated that it will not function as a substitute for the Administrator. It is prepared, however, to assume a role in three areas formerly filled by the Administrator. It will initially process complaints through its "Rapid Charge Processing System." It will also forward all claims to the employers and the union for voluntary resolution or to the Adjustment Board for arbitration. The EEOC will also monitor the periodic reports from the defendants which have been monitored in the past by the Administrator. See Settlement Agreement ¶ 7 at p. 5. The statement by the EEOC regarding the extent to which it will be able to participate in the implementation of the settlement agreement is consistent with the plan proposed by the defendant/movants.

The Interim Administrator indicates that he favors a greater participation of the EEOC in the implementation process than that proposed by the defendant/movants. He

has proposed that the EEOC not only initially process claims but also that it participate in the initial attempts to resolve disputes, hold adjudicative hearings, provide legal and advocacy services to complainants, and be available to answer questions of current and prospective employees regarding their rights under the settlement agreement. He also states that the role of the administrator as an overall supervisor of the industry's progress toward the 25% minority employment goal should be preserved.

Discussion

As indicated above, less than 1% of the membership of the defendant union and less than 2% of the employment in this industry consisted of persons of minority background in 1974. Although significant progress has been made toward the achievement of the settlement goal, it appears that full achievement thereof is not imminent. Less than one-half of the 25% minority employment goal has been achieved in the five-year period from 1974 through 1979, according to the Administrator's last report to the Court. The progress of the industry toward achievement of this goal has not yet reached the point, at which the Court should dispense with the requirement of supervision by a neutral party as set forth in the voluntary settlement agreement. Some mechanism must be provided which will ensure the continued advancement toward the settlement goal.

In this regard, the proposed replacement of the Administrator with the EEOC and the Adjustment Board is not an acceptable alternative to maintaining the position of the Administrator. Under the proposed plan the central function of resolving claims of racial employment discrimination is to be referred to the Adjustment Board which consists of person representing the very defendants who have been charged in these actions with having engaged in practices which resulted in the exclusion of minority employees in this industry. Indeed, some of the claims of employment discrimination which, under this proposal the

Adjustment Board would be called upon to resolve, might well involve defendants who have representatives on the Board.

The Court is mindful of the burden borne by defendants with respect to the costs incurred under the present structure. It is not inappropriate that such costs fall upon those whose conduct or failures have caused the legal and factual situation complained about in the first place.

Accordingly, the application of the defendant/movants is denied. William S. Ellis, Esq. is hereby appointed as Administrator of the settlement agreement, pursuant to paragraph 6 thereof, for a period of five years commencing with the date of the entry of this Memorandum and Order. Since the EEOC and the Administrator agree that the EEOC should participate in the implementation of the settlement agreement, the Court requests that the EEOC and the Administrator submit within 30 days a joint plan regarding the roles of the EEOC and the Administrator.

A final matter which requires resolution is the compensation of the Administrator. Pursuant to the Final Order and Judgment dated October 24, 1974, the Administrator has received compensation for the past five years at the rate of $65.00 Per hour. That rate of compensation, however, is not now consistent with the current rate received by the attorneys in this region. The Court notes that the law firm of which the Administrator is a member presently charges between $85.00 and $150.00 per hour. See Affidavit of William S. Ellis dated May 6, 1980. Under paragraph 5 of the settlement agreement, the Court is authorized to fix the hourly compensation of the Administrator in its discretion. Therefore, the Court hereby directs that William S. Ellis, Esq. shall receive compensation for his future services as Administrator of the settlement fund, commencing with the date of the entry of this Memorandum and Order, at the rate of $85.00 per hour to be paid in accordance with the Order of this Court dated

June 11, 1975.

So Ordered.

No. 73-Civ. 3058 (WCC)
No. 73-Civ. 4278
Filed December 15, 1986

United States District Court
Southern District of New York

JOHN R. PATTERSON, *et seq.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

CONNER, D.J.:

A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights action in 1973 against the Newspaper and Mail Deliverers' Union of New York and vicinity ("the Union") and more than fifty publishers and news distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against blacks and other minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of the past discrimination in violation of Title VII of the Civil Rights of 1964. Each lawsuit sought an affirmative action program designed to achieve the minorities the status they would have had in the newspaper delivery industry but for the alleged discrimination practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties. *Patterson v. Newspaper & Mail Delivers' Union*, [8 EPD ¶ 9736), 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd* [9 EPD ¶ 10,033], 514 F.2d 767 (2d Cir. 1976), *cert. denied* [12 EPD ¶ 11,008], 427 U.S. 911 (1976). The settlement agreement provided that all defendants would be "permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin." Settlement Agreement ¶¶ 1,2. The Union was required to "receive and process applications for membership, admit members, handle grievances and otherwise administer all of the affairs of the NMDU so as to ensure that no individual represented by it is excluded from equal advancement, on the basis of race, color or national origin." *Id.* ¶ 1. The employers agreed not to "fail or refuse to hire for employment any [individual in their bargaining unit represented by the union], [or to] take any other action which would deprive any such individual of

equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin." *Id.* ¶ 2.

In addition, the settlement agreement included an affirmative action program that set a minimum goal of 25% minority employment in Regular Situation and group positions in the industry by June 1, 1979. *Id.* ¶ 7. In an order dated June 10, 1980, Judge Pierce extended the consent decree for another five-year period because the goal of 25% minority employment had not been reached. Now the Administrator and defendants report that the goal has been reached.

Consequently, the Union and most of the defendant employers have moved to vacate the consent decree in its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provision. The EEOC has opposed a complete termination of the decree, but does not object to a modification of the affirmative action provisions for those companies that have 25% minority employment. The private plaintiffs, however, have vigorously objected to defendants' suggestion that the terms of the consent decree should be relaxed and have cross-moved for further relief under the consent decree. Needless to say, defendants have indicated that they oppose these proposals.

On October 21, 1986, I issued an opinion and order deferring a decision on motions of the parties pending a hearing scheduled for the matter on Monday, February 23, 1987 at 10:00 A.M. in Courtroom 618. Since that time numerous disputes have arisen concerning the scope of discovery on the issues raised by the parties' motions. I issue this opinion to provide guidance to the parties concerning the permissible scope of discovery.

In my opinion of October 21, 1986 I ordered an evidentiary hearing to decide whether the consent decree

should be terminated or modified. The consent decree represents a settlement between the parties of this case which was approved by Judge Pierce as long ago as September 19, 1974. This Court is not a party to this agreement and must respect the terms reached by those who are parties to the settlement. Accordingly, I must proceed cautiously before upsetting the settlement agreement in any way.

At the February hearing, the only issue before the Court will be whether the consent decree should be terminated with respect to some or all of the defendants.[1] The hearing will not be for the purposes plaintiff has suggested: *i.e.*, to determine whether defendants have violated Title VII of the Civil Rights Act of 1964 or the consent decree. If plaintiffs believe that defendants have violated the consent decree, they should apply to the Administrator for relief pursuant to the decree.[2] If they believe that the decree was insufficient to end discrimination in the industry, they must bring a new action for the relief they seek. This Court cannot grant such relief by modifying the consent decree.

As I said in my October 21, 1986 opinion, the private plaintiffs are entitled to discovery on the issues to be determined at the hearing, to facilitate a complete and orderly presentation of evidence at the hearing. Any discovery before the February hearing must, however, be limited to the issue before the Court on that date. Plaintiffs'

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[1]It is therefore unnecessary for the Court to consider plaintiffs' motion to bifurcate the issues at the February hearing.

[2]Under the terms of the settlement, the Court's role is limited to review of decisions by the Administrator where timely objection is made in writing. The express terms of the decree provide that alleged violations of the decree are to be brought before the Administrator. Any questions of discovery related to such claims should also be brought before the Administrator in the context of those proceedings.

First Interrogatories are therefore overbroad and defendants are not required to answer them. Since the appropriate scope of discovery is much less broad than plaintiffs first proposed, it is not necessary at this time to order discovery to be expedited.

So Ordered.

Nos. Civ. 3058 (WCC), 73 Civ. 4278 (WCC)

United States District Court
Southern District of New York

March 15, 1988

JOHN E. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff.

v.

NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

CONNER, D.J.

A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and

Mail Deliverer's Union of New York and vicinity and more than fifty publishers and news distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of the past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974 then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating it in a consent decree. *Patterson v. Newspaper & Mail Deliverer's Union*, 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). The settlement agreement established an Administrator, appointed by the Court, to implement the provisions of the consent decree and to supervise its performance. The Administrator hears all claims concerning violations of the consent decree. Appeals from his decisions are heard in this Court.

The action presently before the Court is an appeal from the Administrator's ruling of July 22, 1987. For the reasons set forth below, his ruling is affirmed.

I. Background

The settlement agreement enjoins all defendants from discriminating against any individual or class of individuals on the basis of race, color or national origin. Settlement Agreement ¶¶ 1, 2. By the terms of the agreement, the Union is required to "receive and process applications for membership, admit members, handle grievances and otherwise administer all of [its] affairs . . . so as to ensure

that no individual represented by it is excluded from equal work opportunities including overtime and advancement, on the basis of race, color or national origin." *Id.* ¶ 1. The employers agreed not to deny employment to individuals in the bargaining units represented by the Union, or to deprive such individuals of equal employment opportunities, or otherwise adversely affect their status as employees or applicants for employment because of their race, color or national origin. *Id.* ¶2.

The settlement agreement also establishes an affirmative action program which modifies the collective bargaining agreement for the industry. Prior to the settlement agreement, the collective bargaining agreement required each employer to maintain a work force of regular situation holders for its minimum needs. To accommodate fluctuations in the circulation of the various publications produced by the employers, the contract permitted employers to supplement their work force with daily shapers.

The shapers at the major employers were categorized into groups with descending daily hiring priorities. The group I list was restricted to persons who at one time had held a regular situation in the industry. They had first priority at every shift, in order of their shop seniority. After group I was exhausted at any given shift, the next hiring priority went to group II members. Group II consisted of all persons in group I and all persons holding regular situations in the industry. Once all of the group II members who had appeared for work were employed, the remaining jobs, if any, went to group III members, in order of their shop tenure.

In addition to structuring the daily hiring priorities, the group system also was supposed to represent the priority list for filling regular situations as they became vacant. As a regular situation opened, the person with the greatest tenure on the group III list was entitled to move up the group system.

Judge Pierce found that the group system promoted nepotism and cronyism as the determining factors of advancement within the industry. This had a discriminatory impact on minorities, who were effectively barred from advancing up the group system.

The affirmative action program incorporated in the settlement agreement was designed to correct this discrimination by modifying the group system. The program eliminates the contract provision that the restricted group I to former regular situation holders, and provides for the orderly flow of group III shapers into group I, and from there into regular situations. The agreement mandates that for each non-minority group III member elevated to group I, a minority group III member must also be elevated. Settlement Agreement, ¶11. In addition, for every two non-minority persons added to the group III list, three minority persons must be added. *Id.* at ¶15. Regular situations are filled as they become available by advancing the most senior group I member, without regard to race, color or national origin. *Id.* at ¶ 10(c). The goal of the affirmative action program is 25% minority employment in the bargaining unit throughout the industry. *Id.* at ¶ 7.

The Union wrote to the administrator on September 26, 1986, and requested that he exempt the group III list at New York News, Inc. ("News") from the required 3:2 ratio. The Union asserted that the News was no longer bound by the settlement agreement because minority representation on the group III list was substantially above 25%. On November 21, 1986, the administrator responded by letter that he did not object to the Union's proposal. The Union and the News, however, did not wait for the administrator's response, and on November 4, 1986, the Union and the News advanced ten non-minorities and four minorities to the News's group III list.

Shortly thereafter, the Union and most of the defendant employers moved to vacate the consent decree in

its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provisions, based upon the attainment of the 25% goal. On February 23, 1987, the Court held a hearing on the question of whether the 25% goal had been achieved. Although some employers were able to show that minority employment had reached or exceeded 25% among their employees, it did not appear that minority employment in the bargaining unit had reached 25% throughout the industry. The Court noted that paragraph seven called for "'25% minority employment *in the industry*.'" Hearing Transcript at 124-25 (quoting the Settlement Agreement)(emphasis added). Relying on the express language of the agreement, the Court ruled from the bench that individual employers could not be released from the consent decree, even upon achieving the 25% goal, until minority employment reached 25% in the industry. *Id.* at 125-26. The Court deferred its decision on the motion to terminate the decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit is at 25% throughout the industry as a whole. *Id.* at 132.

On July 22, 1987, the Administrator ruled that the News and the Union had violated the settlement agreement by adding ten non-minorities and only four minorities to the News's November 4, 1986 group III list, and he ordered the placement of eleven minorities on the list. The Union has appealed.

II. Discussion

Paragraph fifteen of the settlement agreement mandates that three minority employees be added to the News's group III list for every two non-minorities. There are no exceptions to this rule.

The Union argues, however, that the Administrator's decision in July 1987 was in conflict with his prior approval, by his November 1986 letter, of an exemption for the News

from the terms of the agreement. In the Union's view, the Administrator's reversal was not justified by a change in circumstances; minority employment at the News in July of 1987 was still in excess of 25% as it was when the administrator issued his letter in November, 1986. Accordingly, the Union asserts that the Administrator's decision in July 1987 should be overturned as arbitrary and capricious.

The Union's argument ignores the significance of the hearing held before this Court in February 1987. At that hearing the Court ruled that the affirmative action program could not be terminated until the entire industry had achieved the 25% goal. The Administrator placed special emphasis on this ruling in his opinion, stating, "Despite recent challenges to it by the defendants, the Decree has *not* been terminated or modified by the Court; it is still in full force and effect and binding on the parties and the Administrator." Record on appeal at 4 (emphasis in original). Thus, the administrator's ruling was justified by his reliance on the hearing before this Court, and clearly was neither arbitrary nor capricious.

The Union also contends that the administrator's decision does not appropriately construe paragraph fifteen of the settlement agreement. In support of this contention, the Union relies on language in paragraphs seven and eleven, which refer to the affirmative action plan set forth in paragraph fifteen as the "new hiring procedure." On the basis of this language, the Union concludes that the affirmative action plan was only intended to apply to persons who are "new hires," that is, persons who have never before worked in the industry. Since the non-minorities who were advanced to the group III list and shaped for previous shifts at the News, they were not new hires, and therefore were not subject to the affirmative action plan.

The Union's reasoning is nothing more than sophistry. The agreement makes no reference to so called new hires.

It refers to a "new hiring procedure." This merely acknowledges that the hiring procedure described in paragraph fifteen is new in that it modifies the old hiring procedure that was employed under the collective bargaining agreement.

Finally, the Union asserts that the affirmative action program should be terminated as to the News because minority employees at the News already constitute more than 25% of the work force. It is well established that affirmative action programs must be terminated once the target racial balance is reached. *See Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 11456 (1987); *Local 2, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019, 3052 (1986); *United States Steel Workers of America v. Weber*, 443 U.S. 193, 208,09 (1979). As discussed above, however, the Court concluded at the February 1987 hearing that the agreement established a goal of 25% minority employment in the bargaining unit throughout the entire industry. The Court refused to lift the decree as to individual employers even though they may have achieved the 25% goal. The evidence submitted at that hearing failed to prove 25% minority employment in the industry, and the Union has not submitted any new evidence on this appeal. Therefore, the 3:2 hiring ratio still applies.

III. Conclusion

For the foregoing reasons, the decision and order of the administrator is affirmed in all respects.

So Ordered.

JOHN E. PATTERSON, *et al.*,
Plaintiffs

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,
Defendants.

In the Matter of the Group III List of
THE NEW YORK TIMES, pursuant to the
terms of the Settlement Agreement.
U.S.D.C., S.D.N.Y.

73 Civ. 3058 (WCC). 73 Civ. 4278 (WCC).
Claim No. 186

United States District Court,
S.D. New York
Sept. 25, 1991

OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

A class of private plaintiffs and the Equal Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU" or "Union") and more than fifty news publishers and distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil

Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed. *See Patterson v. Newspaper and Mail Deliverers' Union,* 384 F.Supp. 585 (S.D.N.Y. 1974) *aff'd,* 514 F.2d 767 (2d Cir. 1975), *cert. denied,* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industry-wide collective bargaining agreement. Under the consent decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. The last priority belongs to Group III shapers.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and to supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Consent Decree. Appeals from his decisions are heard in this Court.

Pursuant to the Settlement Agreement, plaintiffs seek

review of a determination by Administrator William S. Ellis, Esq. (the "Administrator"), denominated "Claim 186." I have reviewed the exhibits and testimony relied upon by the Administrator, as well as the arguments submitted to the Court by the various parties. For the Reasons set forth below, the Administrator's decision is affirmed.

BACKGROUND

In the Spring of 1984, in the belief that the goal of 25% minority employment in the industry had been reached, the Union and most of the defendant employers moved to vacate the Consent Decree in its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provisions. During the period that followed the making of these motions, the matter of Claim 186. The New York Times ("Times") and the Union wished to expand the Group III list to approximately 160 employees and to avoid the 3/2 ratio required by paragraph 15 of the Settlement Agreement.

In February 1985, the Times and the NMDU approached the Administrator to seek his authorization to permit the issuance of a Group III list which would not conform to the 3/2 ratio. The Administrator declined to agree to such a modification, informing the parties that for such authorization to be given, it would have to be with the consent of all the parties to the Consent Decree with the approval of the court.

The Administrator issued an order on August 13, 1985 that such a list should not be issued. Although the Settlement Agreement establishes a procedure for the appeal of Orders of the Administrator, the defendants did not appeal the Administrator's order freezing the Times' Group III list. *See* Settlement Agreement at ¶4. In direct contravention of both the Settlement Agreement and the Administrator's Order, the Adjustment Board of the Times and the Union proceeded to issue a new Group III list of

approximately 175 names effective August 15, 1985.[1] A minority person was placed into every fourth position on the new list. Prior to the issuance of the Preliminary Group III list, the Group III list of the Times had rarely been greater than 40 employees.[2]

On August 20, 1985, the Administrator directed the Times and the NMDU not to use this Preliminary Group III list. The NAACP Legal Defense Fund ("LDF") and the EEOC objected to the list. A hearing before the Administrator was scheduled for August 26, 1985 to consider the objections raised by LDF. At that hearing, after all sides were afforded a full opportunity to be heard, the Administrator directed that (1)a notice should be attached to the Preliminary Group III list emphasizing that it was temporary and subject to the hearing to be held before the Administrator and (2) the Adjustment Board hear the complaints of certain individuals, adding such names as appropriate to the bottom of the list. The Administrator also ordered that the list comprise 30% minority persons. Finally, the Administrator ruled that so long as the persons on the list were qualified a provided in the Adjustment Board's conditions to the list, the Times could hire them from the list while the litigation proceeded. Transcript 114-115, 120.

It was the understanding of all parties that this proceeding would be resolved in two or three weeks and that a new list would be issued with the approval of the Administrator. The hearing started in October 1985, and it was not completed until approximately 6000 pages of

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[1] The Adjustment Board is provided for in the collective bargaining agreement. It is composed of two Times and two NMDU representatives.

[2] At the time that the Preliminary Group III list was issued in August 1985. The Times had reached a minority employment percentage of 30.14%. The industry-wide figure was 24.4%.

transcript later, in July 1988.

The Administrator's Findings

At the hearings the parties presented extensive evidence concerning the formation of the Preliminary Group III list. Based on the evidence presented in the case the Administrator concluded that both the Times and the NMDU had violated the following provisions of the Settlement Agreement:

1. Paragraph 15, dealing with the 3/2 ratio required of the Group III list.[3]

The Administrator found that in light of his refusal to modify the Settlement Agreement in order to permit less than the 3/2 ratio, the Times and the NMDU were obligated to follow paragraph 15 or, in the alternative, to seek recourse to this Court for the purpose of obtaining authorization for such modification. In the face of no such authorization, the Administrator concluded that the Adjustment Board had violated paragraph 15 of the Settlement Agreement whit issued the Preliminary Group III list.

2. Paragraph 15, dealing with the standards to be followed in giving preferences to certain employees to be place on a Group III list.

The Administrator found that the evidence indicated that the primary basis for placing and positioning persons on the Preliminary Group III list was determined by the seniority of one's sponsor at the Times. If the sponsor, who

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[3] This term means that for every five employees added to the Group III list, three were to be minorities and two were to be non-minorities.

Paragraph 15 provides in relevant part:

> Defendant employers shall offer positions available ... on the basis of three (3) minority employees for every two (2) other employees.

was usually the father or some other relative of the applicant, had seniority at the Times, the position of the applicant was determined by reference to such sponsor's seniority. Although the Times attempted to prove that there were other criteria such as (a) shifts worked, (b) tractor-trailer driving ability, and (c) commitment and interest, which were taken into account in determining the placement of an applicant on the proposed Group III list, the Administrator found that such other criteria played but a minor role in the decision. The Administrator's Determination in Claim 186 dated February 27, 1991 ("Administrator's Determination") at 47. Based on the evidence before him the Administrator concluded that the Times and the Union had discriminated in violation of paragraph 15 of the Settlement Agreement.

3. Paragraph 29, dealing with the establishment of a system for the submission of applications.

The testimony given before the Administrator indicated to him that the method by which an applicant applied for placement on the Preliminary Group III list was to give a slip of paper with the name and social security number of the applicant to a foreman or a union official.[4] These slips of paper were collected and treated by the Adjustment Board as applications for Group III. The testimony of various officials who handled these applications indicated that at times no one was sure who was keeping them or where they were being kept. This method of submitting applications for placement on Group III is not set forth in any official document of either the Times or the NMDU or in the Settlement Agreement.

The Administrator found that minority persons were not usually told about this method of submitting applications.

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[4] If any Times' employee submitted a slip of paper on behalf of another person he became known as a sponsor.

In the instances in which they were told, the Administrator found that they were often given incorrect information.

In addition a formal application was available in the lobby of the Times' building. Several minority claimants were found to have filled out such applications. The Administrator found, however, nothing in the testimony to suggest that the Times ever looked at these applications. Though the policy of the Times required that these formal applications be submitted to the Delivery Department for consideration, the Administrator found that these applications were not reviewed by the Delivery Department prior to making the new Group III list.

4. Paragraphs 1 and 2 in reference to discriminatory treatment in the offlist hiring of minority employees and in the various practices of the industry.

The language of paragraphs 1 and 2 of the Settlement Agreement provides that the defendants are prohibited from discrimination in purpose and effect. Under the terms of the Settlement Agreement all activity on the regular situation list, the Group I list, and the Group III list is regulated. Parties to the Settlement Agreement have no discretion to act except pursuant to its terms. In contrast to its procedure for hiring of individuals on the Group I, II and III lists, the Times had no policies or procedures to govern selection of offlist workers but for the general prohibitions of the Settlement Decree.

Based upon the evidence presented, the Administrator found that each of the claimants proved an individual claim of racial discrimination in violation of paragraphs 1 and 2 of the Settlement Agreement with regard

to offlist hiring.[5]

Moreover, the Administrator concluded that since the new Group III list took into account various hiring records which had been developed during offlist hiring, the discriminatory hiring affected the composition and order of the new Group III list. The Administrator found that the evidence supported eighteen individual claims of intentional discrimination with regard to exclusion from or low placement on the Group III list.

Three non-minority, non-union, intervenors, Richard M. Johnson, Richard W. Johnson, and Donald Schley alleged that the Times and the NMDU had violated paragraphs 15 and 29 of the Settlement Agreement and that such alleged violations had an adverse affect on them. The Administrator dismissed their claims for lack of standing.

Remedies

In light of his findings of fact and conclusions of law the Administrator prepared a Group I list on a one-to-one basis, consisting of 48 minorities and 48 non-minorities and a Group III list, as of September, 1985.[6] The Administrator also awarded back pay to those claimants whom he found to have proved individual claims of discrimination with regard to the creation of the Preliminary Group III list. The back pay award covered the period from the date of the issuance of the Preliminary Group III list to November 30, 1988, the

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[5]The Administrator concluded that the plaintiffs failed to prove that there was a pattern and practice of intentional discrimination and that the new list had an adverse impact. Administrator's Determination at 59.

[6]In the fall of 1988, the Administrator applied to the Court for permission to issue an Interim Group I list due to delays in the resolution of Claim 186. The court granted the application by an order dated November 30, 1988 in Claim 229. An Interim Group I list was issued soon thereafter.

date on which the Interim Group I list was issued.[7]

As discussed above, the Administrator found that defendants engaged in intentional racial discrimination against all of the claimants in offlist hiring. The Administrator further concluded that "each [of the claimants] is entitled to an appropriate remedy for the [offlist hiring] violation." Administrator's Determination at 57. The Administrator failed to state explicitly what type of remedy should be imposed for this violation.

Finally, the Administrator ruled that the LDF was entitled to Attorneys' Fees.

DISCUSSION

The Agreement provides the Administrator with broad authority to take all actions he deems necessary to implement the provisions and to ensure the performance of the Order. It further provides that the Administrator shall hear and determine a wide variety of claims arising under the Agreement, which may then be brought before the Court for review. Agreement ¶ 4.

In *Foreman v. Wood, Wire & Metal Lathers International Union, Local No. 46*, 557 F.2d 988, 992 (2d Cir. 1977), the Court of Appeals for the Second Circuit noted that the Scope of review of an independent administrator appointed to ensure compliance with a settlement decree was similar to that applied to an arbitrator's decision. More recently in *United States v. International Brotherhood of Teamsters, Etc.*, 905 F.2d 610, 616 (2d Cir. 1990), the Second Circuit Court reiterated that an administrator's decision is "entitled to great deference." Thus, it is clear that an administrator's decision cannot be rejected merely because a court may be inclined to reach a different result.

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[7]Back pay was to include benefits, vacation pay, pension contributions, and interest on any back pay award.

The Times places great emphasis on its position as "the pacesetter in the industry in affording bargaining unit employment opportunities to minorities." Times Brief at 13. Both the Times and the NMDU argue that the Adjustment Board issued the Preliminary Group III list at a time when it appeared that departure from the 3:2 ratio was permissible if not required. Relying on the fact that the "Times Delivery Department work force was approximately 30% minority, the Times and the Union argue that "there was strong reason for believing it was unlawful to continue following the 3:2 ratio" in light of the Supreme Court decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) (ruling that affirmative action quotas were not without limitation). Times Brief at 18.

This Court is cognizant of the Times record but notes, nevertheless, that the Times and the NMDU took matters into their own hands in open disregard of the plain language of the Settlement Agreement and the explicit order of the Administrator. This they cannot do. A court order must be obeyed. This Court hereby affirms the Administrator's conclusion that the Times and the Union's unilateral noncompliance with the 3:2 ratio set out in Paragraph 15 constitutes a violation of the Consent Decree. Because the Court affirmed the Administrator's finding of a violation of Paragraph 15 on this ground, it does not reach the question whether consideration of sponsorship "as the factor which determined the weight to be given to other factors" violated the preference requirements of paragraph 15 of the /settlement Agreement.

Paragraph 29 provides in pertinent part:

> Applicants for employment with any defendant employer shall report to such office during normal business hours to complete applications for listing on the extra lists at a particular employer, and such applications shall be available only at such office or offices. The Administrator shall receive a monthly

report concerning said applications.

The Administrator interpreted this paragraph as an attempt to "establish a system for the filing of applications which set forth qualifications of the applicant, in a central place available to all, with procedures which afforded an equal opportunity to all interested persons, and which required on a standardized form a request for the type of information that an employer interested in truck drivers and deliverers would need." Administrator's Determination at 48. The Administrator found, on the basis of the evidence presented before him, that the application procedures for the Preliminary Group III list violated Paragraph 29 the Settlement Agreement. This Court finds no basis for reversal of such finding.

Both the Times and the NMDU argue that the selection of off-list hires was not founded on racial consideration but, rather, on the bona fide judgment of foremen regarding past performance and/or expected reliability of drivers. The Administrator rejected these arguments, finding them "pretextual and not credible." Administrator's Determination at 55. The Administrator further concluded that, with regard to eighteen of the claimants, the defendants did not offer credible reasons for their relative placement on or exclusion from the Preliminary Group III list. the Administrator found further that defendants failed to sustain their burden of articulating non-discriminatory reasons for their adverse treatment of the claimants.

This Court, upon consideration of the record and the briefs submitted, finds no basis for concluding that the Administrator's decision was arbitrary or for substituting its judgment for that of the Administrator. This Court recognizes that the Administrator's hearing on Claim 186 covered a period of three-and-a-half years and that approximately 6,000 pages of testimony were taken. He has rendered a reasoned decision that is clearly within the scope

of the authority given to him by the Settlement Agreement. it is obvious that he did not act hastily or without having access to all of the relevant facts. While it may be argued that these findings do not represent the only set of conclusions which the evidence might have supported, I find them to be reasonable and not capricious, arbitrary, or manifestly unfair and therefore affirm that portion of the Administrator's Determination finding intentional discrimination against all claimants in offlist hiring and against eighteen claimants in the creation of the Preliminary Group III list.[8]

* * *

Remedies

As the Times notes, "the formation of these lists is not a simple task." Times Brief at 17. This Court concurs and finds that in crafting the Second Revised Interim Group I list in March 199o, the Administrator reconstructed as closely as possible the status that successful claimants would have held if the Settlement Agreement had not been violated and racial discrimination had not occurred. Those persons heretofore on the Second Revised Interim Group I list at the Times shall be considered hereafter members of Group I. The Union is directed to issue Union cards to all of the employees on Group I. The Union is directed to give priority numbers to the first one-fourth of the Group I list as if they had been inducted on September 1, 1986, and to the second half of the Group I list as if they had been inducted on September 1, 1988.

The Times argues that any monetary relief is neither required nor appropriate even assuming, *arguendo*, that

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[8]This Court does not reach the question of whether the Administrator ruled correctly in concluding that the evidence did not support a finding of a pattern and practice of intentional discrimination or of adverse impact.

violations of the Settlement Agreement were committed, because no back pay award is cognizable under the Settlement Agreement. While Paragraph 37 established a back pay fund in connection with the settlement of the *Patterson* action, nowhere in the Settlement Agreement is there an affirmative statement ordering back pay for violations of the Settlement Agreement. The Times argues that "[p]lainly the parties to the Settlement Agreement knew how to indicate that back pay could be ordered" as a general remedy had such been their intention. Times Brief at 107. The Times argues that the absence of an affirmative statement to that effect is most telling.

It is clear that the parties to the Settlement Agreement intended the Consent Decree to subsume alleged violations of Title VII.[9] This is borne out by the language of the Settlement Agreement providing:

> The Order resolves all issues between plaintiffs and defendants, who have agreed hereto, relating to alleged acts and practices of discrimination by said defendants to which the Order is directed, and with respect to such matters, compliance with the Order shall be deemed to be compliance with Title VII and shall be deemed to satisfy the requirement for affirmative action by said defendants or any of them. The doctrines of *res judicata* and collateral estoppel shall apply to all plaintiffs with respect to all issues of law and fact and matters of relief within the scope of the complaint or the Order.

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[9]The provisions of the Settlement Agreement do not indicate that plaintiffs *waived* their Title VII rights by agreeing to submit Title VII claims (of the type contemplated by the Consent Decree) to the Administrator. On the contrary, submission of such grievances is the functional equivalent of a plenary lawsuit, since compliance with the Consent Decree is tantamount to compliance with Title VI. Settlement Agreement ¶ 42. Moreover, appeals from the determinations of the Administrtor are heard in this Court.

Settlement Agreement at ¶ 42. This identification between the terms of the Settlement Agreement and the requirements of Title VII indicates the parties' intent that discrimination claims be remedied through the Consent Decree's specific enforcement procedures.

For the past sixteen years the Administrator has been hearing and determining claims brought by NMDU members regarding discriminatory treatment and denial of equal opportunity within the New York newspaper industry. The large majority of such claims have involved individuals who were not members of the private class of plaintiffs in 73 Civ. 3058.

Until a recent federal action filed by the LDF there have been, since the entry of the Final Order approving the Settlement Agreement, no lawsuits filed against any defendant alleging discrimination in the bargaining unit represented by the NMDU. Instead, allegations of discrimination have either been settled directly with claimants or presented to the Administrator.

During this sixteen-year period the EEOC and the New York State Division of Human Rights ("NYSDHR") have forwarded to the Administrator for his exclusive consideration almost all charges of discrimination filed by NMDU members with these agencies. On some occasions, such discrimination charges were not forwarded to the Administrator because the employers settled the complaints directly with the individuals involved, the EEOC and/or the NYSDHR without the need for the Administrator's intervention.

It is clear beyond question that the judicially approved and monitored Settlement Agreement expressly authorized the Administrator to adjudicate claims of discrimination. It has long been the position of this Court that if an individual seeks to remedy a wrong contemplated by the Consent Decree, that individual could apply to the

Administrator for relief pursuant to the Consent Decree. Paragraph 42 provides that compliance with the Settlement Agreement in compliance with Title VII and accords a *res judicata* effect to the all issues of law and fact and matters of relief resolved by the Administrator.[10] Retroactive seniority and back pay are routinely awarded to victims of racial discrimination in violation of Title VII. The Settlement Agreement cannot afford complainants fewer types of relief than are available through Title VII litigation. To hold otherwise would deprive complaints under the Settlement Agreement of the remedies available to them through Title VII litigation. Accordingly, this Court concludes that the Settlement Agreement, while not explicitly authorizing the Administrator to award back pay, does not proscribe the award of back pay.

The Times argues that back pay is unwarranted since the purpose of this proceeding was to resolve the competing claims of individuals for placement on the list and that as such, the action was in the nature of an interpleader suit, with the Times akin to a stakeholder. The Times argued that it was "disinterested" in the composition of the Preliminary Group III "so long as the personnel are competent and its staffing requirements are satisfied." Times Brief at 105. The Administrator rejected this argument. Even if the Group III positions were analogized to a stake of money or property, defendants' roles here are not those of stakeholders. Rather than turn the stake over to the Court or to the Administrator, defendants issued and applied the list in violation of both the judicial decree and the

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[10] The Court expresses no view as to whether the Administrator's jurisdiction of discrimination claims within the scope of the Consent Decree is exclusive, although it is difficult to see how court rulings rulings in Title VII actions brought by individual plaintiffs seeking more favored positions on the employment ladder could fail to interfere with the intricate and delicately balanced scheme of affirmative action established by the Decree.

Administrator's explicit order. Even if the defendants request to the Administrator for permission to depart from the 3/2 ratio might be construed as analogous to an interpleader action, the interpleader rules do not allow the stakeholder to begin an interpleader action and then precipitously turn over the money or property to one claimant while the court is deciding how to rule on the interpleader.

The Supreme Court in Albemarle Paper Co. v. Moody 422 U.S. 405, 422, 95 S. Ct. 2362, 2373-74, 45 L.Ed.2d 280 (1975) set out the governing standard for the award of back pay:

> [B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the statutory purposes of eradicating discrimination throughout the economy and making persons who for injuries suffered through past discrimination.

These statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." *Id.* at 417, 95 S.Ct. at 2371.

In this case, the Administrator, who heard all of the evidence and the defendants' arguments, determined that no exception applies and that back pay is an appropriate and necessary remedy for the eighteen claimants who prevailed on claims of intentional discrimination.

The Administrator's conclusion that back pay is an available remedy under the Settlement Agreement is affirmed. The Administrator is directed to hold evidentiary hearings to determine the amount of back pay due and owing to all of the claimants in Claim 186 but for McCargo, Harvey, Streety, and the three non-minority intervenors. The Administrator is further directed to hold an evidentiary hearing for the purpose of determining the relative liability

of The Times and the NMDU.[11]

Title VII establishes a strong presumption in favor of an award of fees to the prevailing plaintiff. The court in Albemarle, supra, relied upon the "strong public interest in actions brought under Title VII to eradicate discriminatory practices" in holding that attorneys' fees should be awarded to successful plaintiffs " in all but very unusual circumstances." 422 U.S. at 415, 95 S.Ct. at 2370. The same right to attorneys' fees applies where, as here, plaintiffs prevail in a proceeding to enforce a settlement agreement. This Court affirms that Administrator's determination that attorneys' fees are recoverable under the Consent Decree and his award of attorneys' fees to he LDF in the instant case.

The Administrator has not recommended that the Times and the Union be held in contempt, finding that little purpose would be served at this time by such a recommendation. This Court concurs and denies the LDF's motion of January 21, 1991 asking the Court to refer the issue of defendants' criminal contempt to the United States Attorney for investigation and determination whether to prosecute.

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[11]The Court affirms the Administrator's determination that the Times and the NMDU are jointly responsible for above-mentioned violations of the Settlement Agreement.

The Union interprets the Administrator's finding that the NMDU and the Times are jointly responsible as meaning that both parties are fifty percent responsible. The Court rejects the NMDU's interpretation. The Administrator is directed to hold an evidentiary hearing to determine the relative culpability of the parties so as to apportion properly liability for monetary compensation. While the Administrator may well conclude that the Times and the NMDU are equally responsible, such decision has not yet been made.

CONCLUSION

For the reasons stated herein the Court affirms the Administrator's Determination of February 27, 1990.

The Administrator is directed to hold evidentiary hearings to determine the amount of back pay due and owing to all of the claimants in Claim 186 but for McCargo, Harvey, Streety, and the three non-minority intervenors. The Administrator is further directed to hold an evidentiary hearing for the purpose of determining the relative liability of The Times and the NMDU.

The question of what relief is appropriate in light of the Administrator's finding of offlist hiring discrimination is remanded to the Administrator for a determination not inconsistent with the views expressed in this opinion.

The motion of the NAACP Legal Defense Fund requesting that this Court refer the question whether defendants should be prosecuted for criminal contempt to the United States Attorney is hereby denied.

SO ORDERED

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

September 30, 1991.

OPINION AND ORDER

WILLIAM C. CONNER, District Judge. A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU" or "Union") and more than fifty news publishers and distributors within the Union's jurisdiction. Both suits charged that the Union, with the

acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation aid Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed. *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F. Supp 585 (S.D.N.Y. 1974) *aff'd* 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The case is presently before the court on the motions of defendants New York Times ("Times"), Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU to modify or vacate the Final Order and Judgment and accompanying Settlement Agreement ("Consent Decree") entered in this action in 1974.

BACKGROUND

The principal purpose of the Consent Decree, which defendants entered "without admission by any defendant of a violation of Title VII . . . or . . . 42 U.S.C. § 1981, and without any finding by the Court that any defendant has discriminated against any person or persons because of race, color or national origin," was "to correct the statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." The consent Decree set a "goal" of 25% minority employment in the industry, which was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available

personnel and resources ... in a good faith effort to maximize employment opportunities in the bargaining units in the industry represented by the NMDU." *See* Settlement Agreement at ¶ 8. The Decree provided, as the means for achieving this 25% goal, an Affirmative Action program setting specified ratios for the employment and advancement of minority persons.

Under the consent decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order to their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situation or Group I positions with other employers in the industry. The last priority belongs to Group III shapers.

The Affirmative Action program eliminates the contract provisions that restricted Group I to former regular situation holders, and provides for the orderly flow in Group III shapers into Group I, and from there into regular situations. The agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Settlement Agreement at ¶ 11. In addition, for every two non-minority persons added to the Group III list, three minority persons must be added. *Id.* at ¶ 15. Regular situations are filled as they become available by advancing the most senior Group I member without regard to race, color, or national origin. *Id.* at ¶ 10(c).

By Order dated November 30, 1988, after finding that the goal of 25% minority hiring had been surpassed, this

Court suspended those provisions of the Settlement Agreement which required 3:2 and 1:1 ratios for placement of individuals on the Group III and Group I lists, respectively, as well as other affirmative action provisions of the Settlement Agreement which had a direct impact on the minority employment goal.

The Settlement Agreement also establishes and Administrator, appointed by the Court, to implement the provisions of the Consent Decree and to supervise its performance. The settlement Agreement authorizes the Administrator to hear claims concerning violations of the Consent Decree. Appeals from his decisions are heard in this Court.

On April 17, 1985, the Times moved for an order, pursuant to Paragraph 7 of the Final Order and Judgment in this matter dated October 24, 1974, and Rule 50(b). Fed.R.Civ.P., vacating or modifying said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied and (2) relief therefrom is justified under present circumstances.[1] On February 23, 1987, the Court held a hearing to consider defendants motion to terminate the Settlement Agreement. The Court ruled from the bench "that notwithstanding that some employers had reached or exceeded the 25% figures within their respective operations," the goal called for in the Settlement Agreement incorporated in the Consent Decree called for "25% minority employment in the industry." *See* Opinion and Order dated March 15, 1988 at 6-7, 1988 WL 31866. Finding that the 25% goal had not been met industry-wide, this Court deferred its decision on the motion to terminate the Consent Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reach 25% through

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[1]On or about April 23, 1985, New York News Inc., the then publisher of the New York Daily News, made a similar motion.

the industry as a whole.

On May 30, 1991, having reviewed quarterly reports which indicated that the 25% goal had been met and exceeded, this Court restored the motions to its calendar in order to take the steps necessary to render a decision. As part of this process, the court directed the Interim administrator to submit compliance reports of all the companies subject to the Settlement Agreement. The Court indicated that upon receipt of the Administrator's findings and after review of submission by the parties, it would address the motions of defendants to modify or terminate the Consent Decree.

DISCUSSION

The Administrator, who is charged to implement the provisions and supervise the performance of the Settlement Agreement, reviewed and evaluated the submissions of each company under his jurisdiction for the purpose of determining compliance with the terms of the Settlement Agreement. After considering all the reports submitted, the Administrator concluded that the minority figure of 28.53% suggested substantial compliance for the industry. Report of the Interim Administrator concerning the Compliance Reports, September 9, 1991 ("Report") at 9.

The NAACP Legal Defense Fund ("LDF") argues, however, that this report is simply a summary of numbers provided by the employers to the Administrator and that the Administrator has taken no action to verify that the numbers actually represent persons working at the various employers and that the persons listed as minorities are actually minority individuals. The LDF maintains that, to the extent that the current percentage of minorities in the industry is relevant to the determination of the pending motion, the Court must grant plaintiffs discovery and allow for an evidentiary hearing on this issue before reaching the merits of defendants'

arguments.[2]

The LDF argues that defendants have not proved with admissible evidence that a 25% minority representation has been reached. Moreover, the LDF has stated that it would object to any motion for entry of the Compliance Reports into evidence as the submissions are "overwhelmingly unverified, self-serving hearsay, unsupported, and unreliable."[3] Thirteen of the fourteen employer submissions are unsworn. The Administrator has not placed in evidence an affidavit verifying the information contained in the compliance reports on the basis of his examination of those reports and independent investigation.

The LDF raises serious questions as to the accuracy and reliability of the Compliance Reports. It is necessary to resolve any question regarding the accuracy of said reports before reaching the merits of defendants' pending motions to terminate the Consent Decree. Before exercising its power to modify, a court must be convinced by the party seeking relief that existing conditions differ so substantially from those which precipitated the decree as to warrant judicial adjustment.

CONCLUSION

This Court hereby directs each defendant to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports. If plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions, they will be

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[2]LDF argues that it was unable to undertake a complete analysis of the unverified information contained in those documents since it only received the documents in the early evening of September 10, 1991, four days before the dead line to file it surreply.

[3]The LDF also objects to entry and consideration of the Administrator's Report as it is alleged to be based on wholly unverified data.

allowed limited discovery to investigate the facts underlying the data provided and to verify their accuracy. If plaintiffs so request, the Administrator shall conduct an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports. Plaintiffs will hear the burden of proof to show that such reports are incorrect. This Court hereby defers consideration of defendants' motions to modify or terminate the Consent Decree until such time as it receives the Administrator's final report, based upon verified data, that the 25% minority employment figure has been achieved.

SO ORDERED.

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

July 8, 1992.

OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and

Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed.[1] *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F.Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976).

The Settlement Agreement established a goal of 25% minority employment in the industry within NMDU bargaining units. *See* Settlement Agreement at ¶ 7. That "goal" was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by NMDU." *See* Settlement Agreement at ¶ 8. To achieve this goal the Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industry-wide collective bargaining

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[1] The Settlement Agreement is divided into four sections: Equitable Relief (¶¶ 1-2), The Administrator (¶¶ 3-6), Affirmative Action Program (¶¶ 7-27), and General Provisions (¶¶ 28-42).

agreement. Under the Consent Decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. Last in order of priority are the Group III shapers.

The Settlement Agreement provides for the orderly flow of Group III shapers into Group I, and from there, into regular situations. The Agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Moreover, the Agreement requires that for every two non-minority persons added to the Group III list, three minority persons must be added. Through this process, it was intended that the proportion of minority workers in the industry would increase to the 25% goal by June 1979. *See* Settlement Agreement ¶¶ 11, 12, 15. When that goal was not reached by the specified date, the relevant provisions were extended and later extended again.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Decree. Appeals from his decisions are heard in this Court.

BACKGROUND

On April 17, 1985, the New York Times (the "Times") moved for an order, pursuant to Paragraph 7 of the Final

Order and Judgment in this matter dated October 24, 1974, and Rule 60(b), Fed.R.Civ.P., to vacate or modify said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied; and (2) relief therefrom is justified under present circumstances.[2] On February 23, 1987, the Court held a hearing to consider defendants' motion to terminate the Settlement Agreement. At the conclusion of the hearing, the Court ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." *See* Hearing Transcript at 125. Accordingly, this Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry as a whole.[3]

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, this Court restored defendants' motion to vacate the Consent Decree to its calendar. In order to aid it in rendering a decision, the Court directed the Interim Administrator to submit compliance reports of all defendant companies. On September 9, 1991, the Interim Administrator issued a Report in which he concluded that "the minority figure of 28.53% suggests substantial compliance for the industry." Report of the Interim Administrator Concerning the Compliance Reports ("Report") at 9.

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[2] On or about April 23, 1985, New York News Inc., the then-publisher of the New York *Daily News*, made a similar motion.

[3] By Order dated November 30, 1988, the Court prospectively suspended the 3:2 and 1:1 ratios of the Affirmative Action Program embodied in the Consent Decree.

On September 30, 1991, the Court issued an Opinion and Order in which it deferred consideration of defendants' motion to vacate the Decree in order that the concerns of the NAACP Legal Defense Fund (the "LDF") respecting the validity of the compliance reports could be addressed. In this regard, the Court indicated that three things would be required or allowed to happen before it again considered the pending motion: (1) each defendant company was to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; (2) the LDF and the EEOC could undertake limited discovery concerning the compliance reports "[i]f plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions;" and (3) the Administrator was to "conduct an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports" "[i]f plaintiffs so request." Opinion and Order, dated Sept. 30, 1991, at 8.

On November 27, 1991, the Administrator provided the Court with a declaration under the penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies, through an authorized agent, to the effect that the compliance reports consisted of and/or were based upon corporate business records.[4] Plaintiffs never availed themselves of the opportunity to conduct discovery of the defendant companies with respect to their compliance

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[4] The statements provided the Court on November 27, 1991 affirm the accuracy of the compliance reports. LDF's argument that no credence can be accorded to what it asserts are "unsworn" statements is unpersuasive. Defendants' statements affirming the accuracy of the compliance reports are declarations subscribed to under the penalty of perjury. By the plain terms of 28 U.S.C. § 1746, such statements are the equivalent of a sworn affidavit, having "like force and effect." Accordingly, in prescribing this verification procedure, the Administrator has established a sufficient basis for the compliance reports to be admitted into evidence and relied upon by the Court.

reports.[5] On April 2, 1992, Interim Administrator Ellis circulated a letter in which he indicated that the LDF did "not intend to conduct any further investigation concerning the compliance reports." The Interim Administrator's letter makes no reference to any request by the LDF for an evidentiary hearing concerning the validity of the compliance reports. On April 7, 1992, the Court restored the pending motion to modify or vacate the *Patterson* Consent Decree to its calendar for consideration.

This matter is presently before the Court on the motion of defendants Times, Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU pursuant to paragraph 7 of the Consent Decree[6] and Rule 60(b), Fed.R.Civ.P.,[7] to vacate or modify the Consent Decree. For the reasons discussed below defendants' motion

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[5] The EEOC assures the Court that it was and is satisfied with the veracity of the compliance reports, and therefore does not object to a judicial determination that the Affirmative Action and Administrator provisions of the Consent Decree should be vacated. *See* EEOC Supp. Memo., dated May 26, 1992, at 1, 8 & n. 3.

[6] Paragraph 7 of the Final Order provides that this Court "retains continuing jurisdiction . . . for the purpose of enabling any of the parties to apply to the Court for such further orders and directions as may be necessary or appropriate."

[7] Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

to vacate is granted. The requests of the LDF and the EEOC for continuation of the Consent Decree's substantive provisions, as well as continuation of its existing enforcement mechanism or introduction of a new one, are denied.

DISCUSSION

The principal purpose of the Consent Decree, which defendants entered "without admission by any defendant of a violation of Title VII . . . or . . . 42 U.S.C. § 1981, and without any finding by this Court that any defendant has discriminated against any person or persons because of race, color or national origin," was "to correct the . . . statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." The Affirmative Action Program, with its implementation ratios for placement of minorities on Group III and Group I toward the end of attaining the 25% target, was the engine for achieving these purposes.

Applicable Legal Standard

The court's jurisdiction to vacate or modify the Consent Decree arises not only from the Consent Decree itself, but from Rule 60(b) of the Federal Rules of Civil Procedure and this Court's inherent equitable power over its decree in *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), the Supreme Curt held that:

> Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.

Before exercising its power to modify or vacate a judicial decree, a court must be convinced by the party seeking relief that the purposes of the litigation as incorporated into the decree have been fully achieved. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968); *see also Rufo v. Inmates of Suffolk County Jail*, __ U.S. __, 112 S.Ct. 748, 758, 116 L.Ed.2d 867 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, __ U.S. __, 111 S.Ct. 630, 636-37, 112 L.Ed.2d 715 (1991). Second Circuit authority is consistent with the case law cited above, recognizing the necessity for liberal modification of final judgments. *See e.g., New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 967-70 (2d Cir.). *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 257 (1983) (modification power is "broad and flexible," and is appropriately exercised in light of changing factual circumstances; *Chance v. Board of Examiners*, 561 F.2d 1079, 1086 (2d Cir. 1977) (indicating that vacation of a consent decree is possible when"the purposes of the decree have been achieved.")

The EEOC maintains that this case is governed solely by *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed.999 (1932), and that *Dowell* and *Rufo* are inapplicable, so that the permanent injunction portions of the Consent Decree may not be dissolved without a clear showing of grievous harm evoked by new or unforeseen conditions. The Court cannot agree. In *Swift*, the Supreme Court stated:

> The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and

> unforeseen conditions should lead us to change [the decree.]

286 U.S. at 119, 52 S.Ct. at 464. Since *Swift*, however, the Court has placed less emphasis on the deleterious effects of a decree on the defendant and more on the continuing need for the injunction. In *Rufo*, after examining its "decisions since *Swift*," the Supreme Court specifically remarked "that the 'grievous wrong' language of *Swift* was not intended to take on an talismanic quality, warding off virtually all efforts to modify consent decrees." 112 S.Ct. at 758. The *Rufo* Court cited *United Shoe* for the proposition that *Swift* did not stiffen "the traditional flexible standard for modification of consent decrees." *Rufo*, 112 S.Ct. at 757-58. The Court noted:

> The *Swift* opinion pointedly distinguished the facts of that case from one in which genuine changes required modification of a consent decree, stating that:
>
> > "The distinction if between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.... The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

112 S.Ct. at 758.

The restraints imposed by the Decree in the instant case, unlike those at issue in *Swift*, were never intended to operate in perpetuity. Indeed, only paragraphs 1 and 2 are declared "permanent." The remaining provisions of the Decree were provisional only -- they were to last until the

vestiges of racial discrimination in the industry had been removed. As stated in the Consent Decree, the attainment of 25% minority employment industry-wide was the standard established for measuring compliance with this objective. Since the *Patterson* Consent Decree "involve[s] the supervision of changing conduct or conditions," *see Swift*, 286 U.S. at 114, 52 S.Ct. at 462, the Court concludes that the more rigid standard set forth in *Swift* is inapplicable and that the more flexible standard of demonstrating satisfaction of the Decree's purposes applies to the decision of whether to terminate or modify the Consent Decree.[8]

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[8]Moreover, as the Supreme Court has noted, the strict standard for modification or vacation of a consent decree announced in *Swift* should not be read out of context: the *Swift* consent decree evolved out of a prolonged antitrust battle between the Government and the meat-packing industry. *See Rufo*, 112 S.Ct. at 757. The Supreme Court, as well as lower federal courts, have distinguished *Swift* from cases arising in an institutional reform setting. Indeed, the Second Circuit has explained that where a decree is the product of institutional reform, an application for the modification of such decree "should . . . be viewed with generosity," and modified with "rather a free hand." *New York State Ass'n for Retarded Children*, 706 F.2d at 970-71.

While the institutional reform exception to the standard set forth in *Swift* apparently has only been invoked in cases where the conduct of a governmental facility or operation was being regulated pursuant to the decree, the Court concludes that such cases are analogous to the instant action, suggesting that the same flexible standard regarding vacation nor modification ought to apply. Unlike purely commercial consent decrees which involve only the parties to the subsisting litigation, this case, like those in the institutional reform arena -- wherein consent decrees were executed, for example, to correct unconstitutional conditions existing in persons or to remedy the existence of racial segregation in certain of the nation's schools -- implicates the public's interest in seeing that persons are not deprived of fundamental rights.

Motion to Modify or Vacate the Consent Decree.

The Administrator's statistical complication of September 17, 1991, which is drawn from the compliance reports, establishes that approximately seven months age minority representation among regular situation and Group I personnel industry-wide was 27,97%. See Letter of Interim Administrator Ellis to the Court, dated Sept. 17, 1991. Subsequent reports show that this level of minority employment has been maintained.[9] As the Court has often noted, minority representation in the membership of NMDU in the newspaper industry in metropolitan Nw York was less than 1% when the Consent Decree was issued in 1974. The present employment statistics indicate that the pervasive discrimination which caused the near total absence of minority opportunities in 1974 has vanished. The stated objective of the affirmative action program set forth in the Consent Decree— 25% minority employment industry-wide— has been achieved. The structure put in place in 1974 to achieve that end is now an unnecessary and expensive relic, and ought to be retired.[10]

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[9]The latest revised Quarterly Report of the Administrator, submitted May 26, 1992, indicates that minority representation in the industry represented by the NMDU was 27.78% as of March 30, 1992.

[10]The Court agrees with the Times that a foundation is now in place which suggests that minority representation in the industry will continue to increase, notwithstanding vacation of the Consent Decree, because of a "carryover" effect resulting from concentration of minorities in lower seniority positions on regular situation and Group I lists, coupled with increased voluntary attrition through retirement of more senior, predominantly non-minority NMDU personnel. For example, the Administrator's Report, dated September 9, 1991, demonstrates that while minorities hold only 11 of the first 100 positions on the Times' regular situation list, minority presence increases dramatically thereafter, minorities hold 45 of the positions numbered 100 through 199; 39 of the positions numbered 200 through

(continued...)

The LDF argues that the Consent Decree must continue in effect since it contains no expiration date applicable to its substantive provisions. Accordingly, the LDF contends that the parties intended the Consent Decree "to remain in force indefinitely" pending a judicial finding that "every facet" of defendants' operations is free of discrimination. LDF Memo., dated June 27, 1991, at 22. The LDF further submits that such a showing cannot be made at this time and, therefore, that the Consent Decree should remain in force with an Administrator at its helm for another five years.

The parties to the Settlement Agreement could not have intended that the Affirmative Action program and the Administrator provisions would be of infinite duration. Rather, it is clear that those provisions were to remain in place only as long as necessary to effectuate the goal of 25% minority employment in the industry represented by the NMDU. This intent is evidenced by the language of the settlement Agreement itself. For example, the Settlement Agreement specifically states that:

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[10](...continued)
299; and 22 of the positions numbered 300 through 367. In addition, roughly 50% of the times' Group I list is comprised of minorities. the situation at other employers is similar. Accordingly, the posture in which the Consent Decree leaves these lists virtually ensures, via retirements, deaths, buyouts, and attrition, increased minority presence in the industry after the Decree is vacated.

The fact that there are pending or completed proposals by the Times and Imperial Delivery Service, Inc. ("IDS") to purchase the assets of several defendant companies—whereby "28% of the regular situation and Group I positions covered by the Consent Decree will be under new ownership" ("Times Supp. Memo., dated may 1, 1992, at 7)—does not prevent the Court from concluding that the parties have shown compliance with the goal of 25% minority representation industry-wide. Indeed, it is likely that the buyouts offered employees in conjunction with these transactions will be exercised by many more senior employees, thereby accelerating minority movement up the lists.

> Any terms and provisions of any collective bargaining agreements between NMDU and any defendant employer which have been suspended by operation of the Order may be put into effect *when the Order terminates*, unless this Court orders otherwise.

Settlement Agreement at ¶33 (emphasis added.) Similarly, the Settlement Agreement did not intend that the Administrator's functions would continue indefinitely:

> The Administrator designated by the Court shall remain in office for an initial period of five (5) years after the date of entry of the Order ... and *he or his successor thereafter shall remain in office if and for such time as the court may direct.*

Id. at ¶ 6 (emphasis added).

The affirmative action plan embodied in the *Patterson* Consent Decree, like that approved by the Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979), was "not intended to maintain racial balance but simply to eliminate a manifest racial imbalance." To maintain the temporary affirmative action provisions provided for in the Settlement Agreement after they have served their stated purpose would not only be beyond the intent of the parties but would also infringe on the legitimate expectations of non-minority employees. In *EEOC v. Local 638 ... Local 28 of Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1186-87 (2d Cir. 1985), *Aff'd*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986), the Second Circuit, following the Supreme Court's decision in *United Steelworkers of America v. Weber*, held that "a temporary, race-conscious affirmative action remedy such as a membership goal" lasts "only until the effects of the past discrimination have been eliminated...." The purpose of the Consent Decree in the instant matter has been achieved—the 25% goal agreed to by all parties to the *Patterson* action with the intention of eliminating the effects of past

discrimination has been attained. The time has come for this Court to vacate the Consent Decree and allow the industry to self regulate subject, of course, to the laws preventing racial discrimination.[11]

The LDF's Request for a Hearing

The LDF argues that the Court may not terminate or modify the Consent Decree without a full evidentiary hearing. The LDF requests a hearing so that it may prove: (1) that the industry has committed numerous discriminatory acts and violations of the Settlement Agreement, even during the period while the motions to terminate were pending; (2) that the industry is not capable of self-policing; (3) that racial discrimination will escalate if the office of the Administrator is eliminated or other protections afforded by the Settlement Agreement are removed; (4) that an Administrator is desperately needed to protect the rights of minority workers and applicants; (5) that the labor market for jobs within the jurisdiction of the NMDU is now well over 50% minority and (6) that hiring ratios are still needed in order to prevent massive racial discrimination in hiring. LDF Memo., dated June 27, 1991, at 18-19.

Such a hearing, however, is neither required nor necessary. In the instant case, the Administrator, as well as the Court, has monitored compliance with the Settlement Agreement since its inception. With respect to the instant motion to vacate or terminate the Consent Decree, the parties have presented extensive arguments to this Court in

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[11]Moreover, the Court notes that the parties, in entering into the Consent Decree, could not have intended that defendants should be bound for all eternity to incur the expenses attendant to maintaining the office of the Administrator. Those expenses have been substantial — for example, the Administrator's fees and expenses for the period January 1975 through March 1985 totalled $575,773. See Aff. of Richard J. Jordan, Esq., Director of Labor Relations of the News, at ¶ 11 (annexed to News Memo., dated April 23, 1985).

various motion papers, at a conference held on May 30, 1991, and at a hearing held on February 23, 1987. There is, accordingly, a vast evidentiary foundation—both statistical and experiential—which this Court may explore in order to decide whether vacation of the Decree is appropriate.

Even assuming *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree.[12] As this Court has stated previously:

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[12]Similarly irrelevant is the LDF's argument that 25% minority employment is not longer the appropriate goal given the current relevant labor market. In effect, the LDF asks the Court to ignore the bargained for goals as set forth in the Settlement Agreement—a goal negotiated by the parties and approved by the Court—simply because the goal was not achieved as of June 1, 1979. This the Court will not do. Although the parties set June 1, 1979 as a target date for attainment of the goal, in the event that the goal was not reached by June 1, the Settlement Agreement provides for the reappointment of an Administrator by this Court beyond that period. Surely, had the parties intended the goal to vary depending on the labor market pool in a particular year, they would have drafted an agreement to that effect.

LDF cites *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), in which the Sixth Circuit reversed the District Court *sua sponte* termination of a consent decree and ordered the lower court to consider the possibility that the city's racial composition had changed to much since the date the decree was executed that the original hiring goal was obsolete. LDF's reliance on this case is misplaced. The consent decree there specifically directed the defendants to achieve minority representation in the work force consistent with minority representation in the relevant labor market. 925 F.2d at 956. Although a numerical minimum also was stated, the labor market "party" language in the decree furnished a basis for the conclusion that the minority goal fluctuates with changes in the labor market. No comparable language that would warrant a similar conclusion is present in the *Patterson* Consent Decree.

> The hearing will not be for the purposes plaintiff has suggested: i.e. to determine whether defendants have violated Title VII of the Civil rights Act of 1964 or the consent decree. If plaintiffs believe that defendants have violated the consent decree, they should apply to the Administrator for relief pursuant to the decree. If they believe that the decree was insufficient to end discrimination in the industry, they must bring a new action for the relief they seek. This Court cannot grant such relief by modifying the consent decree.

Patterson v. NMDU, 42 Empl. Prac. Dec. ¶ 36,722, at 45,281, 1986 WL 14976 (S.D.N.Y., December 15, 1986). The Court granted the LDF an opportunity to request an evidentiary hearing before the Administrator on the only fact relevant to the issue of whether to terminate the Consent Decree -- whether the 25% minority employment goal as been achieved. The LDF did not avail itself of that opportunity for over six months and cannot be heard to complain now.

To the extent that the LDF feels that discrimination in the industry continues, despite the attainment of the 25% goal, it is free to bring a new action for the relief it seeks. Indeed, if discrimination is as rampant as the LDF asserts after eighteen years of the Consent Decree, it would be manifest that the Decree has been "insufficient to end discrimination in the industry" and that the LDF should, consistent with the Court's ruling, "bring a new action for the relief [it] seek[s]."[13] *Id.* Because new suits may be directed

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[13]Title VII channels are open to any potential complainants. In addition, since 1987 the NMDU labor contracts have routinely included an anti-discrimination clause. As a result, minority employees throughout the industry can assert and pursue grievances arising from their employers' or the Union's asserted discriminatory conduct through the NMDU labor contracts's grievance procedure. Failure on the part of the Union to properly represent a grievant in

(continued...)

against the NMDU alone or particular employers, enterprises that have achieved substantial minority presence in their work forces and police themselves in other relevant respects need not be entangled in such litigation.

Plaintiffs' Request that Certain Provisions be Retained

The Times argues that the termination provisions of Paragraph 7, which provide the basis for extinguishing the Affirmative Action program, also apply to the remainder of the Consent Decree. The Times argues, therefore, that the Consent Decree must be vacated in its entirety. Both the EEOC and the LDF argue that each of the sections of the Settlement Agreement is independent and consequently, paragraphs 15, 17, 20, 21, 28, 29, 30, 33, and 41 should be retained, either in part or in their entirety, irrespective of the disposition of the other parts of the Settlement Agreement. *See* EEOC Memo., dated June 27, 1991, at 15-21; LDF Memo., dated June 27, 1991, at 34-37. Nothing in the Settlement Agreement, however, supports, this type of cut and paste approach. The Settlement Agreement is one cohesive document the goal of which was to increase minority employment in the industry to 25%. The Agreement created the mechanism by which to reach that goal. Again, the parties to the Consent Decree could not have envisioned that jurisdiction however would be retained indefinitely so as to establishing, in effect,a permanent system of court supervision of the industry—an ongoing burden of perhaps endless duration that should not be within the Court's ambit.

The Court, cannot agree with the argument of the EEOC that retention of certain of these provisions is

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[13](...continued)
such matters would permit the grievant to file charges with the National Labor Relations Board. Thus, an aggrieved employee also has the grievance and arbitration mechanism of the Collective Bargaining Agreement in the event a claim of discrimination arises.

necessary since the purpose of the consent decree extends beyond the goal of 25% minority employment to remedying and preventing nepotism, cronyism and word-of-mouth hiring. EEOC Reply Memo., dated aug. 19, 1991, at 4-9. The Settlement Agreement was obtained by the EEOC in the enforcement of Title VII with the express purpose of remedying and preventing race discrimination in the industry. Unless there is disparate impact on minority persons, nepotistic practices do not furnish the basis for finding a violation of Title VII. *See, e.g., Scott v. Pacific Maritime Ass'n.* 695 F.2d 1199, 1205-07 (9th Cir. 1980) (no violation of Title VII based on racial discrimination where plaintiffs failed to make prima facie showing of disparate impact in operation of union's permissive rule, providing that the son or daughter of a deceased longshoreman or clerk is to be granted Class B registration if he or she is the sole support of the deceased's widow and over the age of 18 years). Because minorities are not now underrepresented in the industry, nepotistic practices could, if they existed, advantage minority persons as much as non-minorities. The objective of the Consent Decree was the elimination of minority underprepresentation in the industry, and no more. Since the 25% goal has been attained, the Decree has served its purpose, and its vacation, consistent with the intent which accompanied its entry, is appropriate.

Nor is the retention of paragraphs 1 and 2 of the Settlement Agreement justified. those paragraphs parallel federal law and prohibit discrimination against individuals on the basis of race, color, or national origin. While it is true that paragraphs 1 and 2 purport to enjoin defendants "permanently," the enforceability of these provisions is qualified. Both begin with the phrase "[s]ubject to the provisions herein." Accordingly, defendants are permanently enjoined from committing discriminatory acts "subject to" the other provisions of the Consent Decree. The only intelligible construction of this "subject to" language is that the non-discrimination provisions are binding upon defendants as

long as the Consent Decree remains in effect—in other words, until the Court determines that the Consent Decree is no longer needed. In any event, paragraphs 1 and 2 do no more than prohibit conduct that is already prohibited by Title VII. Given this redundancy, there is no point in continuing those provisions after the remainder of the Consent Decree has been terminated."[14]

The fact that paragraphs 1 and 2 are designated "permanent" is not a proscription against their termination. As the Supreme Court noted in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298, 61 S.Ct. 552, 557, 85 L.Ed. 836 (1941):

> The Injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the [the circumstances] that induced it and only so long as it counteracts [those circumstances]. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.

Thus, the term "permanent" does not mean irrevocable in perpetuity, and the court has the power to vacate injunctive relief that nominally is "permanent."

Indeed, courts have indicated that permanent injunctive relief should be vacated when its requires nothing more than compliance with the law that was the source of its issuance. In *S.E.C. v. Warren*, 583 F.2d 115 (3d Cir. 1978), the Third Circuit ruled that the district court did not abuse its discretion in dissolving a permanent injunction which

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[14]The EEOC is mistaken in its contention that at a conference held on May 30, 1991, this Court indicated that it would not dissolve paragraphs 1 and 2 of the Consent Decree. The Court did not so rule, rather, it referred to the effective continuation of these provisions by the laws against discrimination.

contained a restraint from future violations of the Securities Exchange Act. The court noted that:

> In effect the injunction requires defendants to "obey the law" in the future "a requirement with which they must comply regardless of the injunction. Dissolution of the injunction decree removes the possibility of contempt proceedings in the event of a future violation; the right to prosecute ... civilly still exists.'

583 F.2d at 121. *See also Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 56 L.Ed.2d 131 (1978) ("[t]he word 'discriminating' ... is too general. The provision is more specific than Title VII itself only in that it does not prohibit employment discrimination based on religion and natural origin ... Such 'obey the law' injunctions cannot be sustained").[15]

The terms and spirit of the Settlement Agreement, as well as the law of the case, dictate that the Consent Decree be extinguished upon attainment of the 25% target. That target having been attained, this Court hereby orders that the Consent Decree be vacated in its entirety. After eighteen years of Court and Administrator supervision, the goal has been achieved. Both equity and judicial economy dictate that the EEOC resume its role as the initial forum

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[15]The rationale for this principle is that an "obey the law" injunction is too vague to enforce under the standards of Rule 65, Fed.R.Civ.P., since contempt is a possible remedy for its violation. The Court of appeals for the Second Circuit has acknowledged that Rule 65(d) "reflects Congress' concerns with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds." *Sanders v. Air Line Pilots Ass'n. Int'l.*, 473 F.2d 244, 247 (2d Cir. 1972) (citing *Int'l. Longshoremen's Ass'n. Local 1291 v. Philadelphia Marine Trade Ass'n.*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967).

for review of allegations of discrimination under Title VII. As the Court of Appeals for the Sixth Circuit stated in *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991):

> The concerns originally voiced in the decree may yet remain.... Yet our interest in seeing that the decree is not dissolved prematurely is coupled with a realization that not every wrong in the Cincinnati fire department can be righted by a decree which is now 17 years old, and the district court may find that other . . . litigation offers a better vehicle for addressing any alleged legal wrongs in the City's policies today once those initial goals have been achieved.

925 F.2d at 961-62 (footnote omitted). Like the court in *Youngblood*, this Court recognizes that the current Consent Decree may not offer the best solution to any ongoing concerns that today's victims of discrimination may voice."[16] *Id.* at 961.

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[16]The LDF's Offer of Proof, dated August 19, 1991, contains the declaration of 29 minority regular situation holders at the defendants Long Island News Co., Metropolitan News Co., the News, the Post, the Times, Newark Newsdealers Supply, Passaic County News, Westfair News, and Imperial News Co. These individuals make allegations of intentional discrimination in connection with assignment of work, discipline, compensation, selection of foremen, adjustment of routes following route consolidation, bidding, and tractor-trailer certification. Such assertions are not properly raised at this time. In December 1986, this Court instructed the LDF to prosecute alleged violations of the Consent Decree before the Administrator. Such matters are not to be raised for the first time in this proceeding. *See Patterson v. NMDU*, 42 Empl. Prac. Dec. ¶36,722, at 45,281, 1986 WL 14976 (S.D.N.Y. Dec. 15, 1986). Assuming, *arguendo*, that the declarants' accusations are true this Court reiterates that "not every wrong ... can be righted by a decree which is now [18] years old." 925 F.2d at 961. Other litigation may today offer a better vehicle for addressing any alleged legal wrongs.

It must be emphasized that the termination of the Consent Decree does not alter defendants' substantive legal obligation to obey the law. Nor does vacating the Consent Decree permit defendants to discriminate against minorities in employment decisions. Title VII and other similar laws remain in effect and are fully applicable to defendants. As in all other sectors of the economy, aggrieved individuals will be able to take any complaints they may have to the EEOC, and ultimately to the courts if appropriate, for processing.

CONCLUSION

The Consent Decree is hereby vacated in its entirety. In order to affect an orderly winding down of the Administrator's office he is instructed to hear and decide all claims that have been instituted prior to the date of this Order. Until such cases are disposed of the Administrator's services shall be continued, but for the sole purpose of completing said cases. This Court shall retain jurisdiction over any appeals from those claims. No new claims shall be initiated or processed.

SO ORDERED.

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

Sept. 30, 1992

OPINION AND ORDER

WILLIAM C. CONNER, District Judge:

This matter is presently before the Court on the motion of the NAACP Legal Defense Fund, pursuant to Rule 62(c), Fed.R.Civ.P., requesting that the Court stay its

Judgment Order of July 29, 1992[1] and restore the injunction of the *Patterson* Consent Decree pending appeal of that judgment to the Second Circuit Court of Appeals.

BACKGROUND

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed.[2] *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F.Supp. 585 (S.D.N.Y. 1974), *aff'd.* 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). Paragraphs 1 and 2 of the

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[1] The LDF styles this as an application to stay the Court's July 8, 1992 Order even though its Notice of Appeal indicates the appeal is from the Judgment entered July 29, 1992. *See* Times Exh. A.

[2] The Settlement Agreement is divided into four sections: Equitable Relief (¶¶ 1-2). The Administrator (¶¶ 3-6), Affirmative Action Program (¶¶ 7-27), and General Provisions (¶¶ 28-42).

Consent Decree permanently enjoin both the Union and the defendant employers from engaging in "any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals in their bargaining units represented by NMDU on the basis of race, color or national origin." The injunction provisions also prohibit all defendants from taking "any action which would deprive any such individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin."

The Settlement Agreement established a goal of 25% minority employment in the industry within NMDU bargaining units. *See* Settlement Agreement at ¶ 7. That "goal" was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by NMDU." *See* Settlement Agreement at ¶ 8. To achieve this goal the Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industrywide collective bargaining agreement. Under the Consent Decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. Last in order of priority are the Group III shapers.

The Settlement Agreement provides for the orderly flow of Group III shapers into Group I, and from there, into regular situations. The Agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Moreover, the Agreement requires that for every two non-minority persons added to the Group III list, three minority persons must be added. Through this process, it was intended that the proportion of minority workers in the industry would increase to the 25% goal by June 1979. *See* Settlement Agreement ¶¶ 11, 12, 15. When that goal was not reached by the specified date, he affirmative action provisions were extended, and later, extended again.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Decree. Appeals from his decisions are heard in this Court.

On April 17, 1985, the New York Times (the "Times") moved for an order, pursuant to Paragraph 7 of the Final Order and Judgment in this matter dated October 24, 1974, and Rule 60(b), Fed.R.Civ.P., to vacate or modify said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied; and (2) relief therefrom is justified under present circumstances.[3] On February 23, 1987, the Court held a hearing to consider defendants' motion to terminate the Settlement Agreement. At the conclusion of the hearing, the Court ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." *See* Hearing Transcript at 125.

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[3] On or about April 23, 1985, New York News Inc., the then-publisher of the New York Daily News, made a similar motion.

Accordingly, this Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry as a whole.[4]

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, this Court restored defendants' motion to vacate the Consent Decree to its calendar. In order to aid it in rendering a decision, the Court directed the Interim Administrator to submit compliance reports of all defendant companies. On September 9, 1991, the Interim Administrator issued a Report in which he concluded that "the minority figure of 28.53% suggests substantial compliance for the industry." Report of the Interim Administrator Concerning the Compliance Reports ("Report") at 9.

On September 30, 1991, the Court issued an Opinion and Order in which it deferred consideration of defendants' motion to vacate the Decree in order that the concerns of the LDF respecting the validity of the compliance reports could be addressed. In this regard, the Court indicated that three things would be required or allowed to happen before it again considered the pending motion: (1) each defendant company was to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; (2) the LDF and the EEOC could undertake limited discovery concerning the compliance reports "[i]f plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions;" and (3) the Administrator was to "conduct an evidentiary hearing following the close of discovery to determine the

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[4] By Order dated November 30, 1988, the Court prospectively suspended the 3:2 and 1:1 ratios of the Affirmative Action Program embodied in the Consent Decree.

validity of defendants' compliance reports" "[i]f plaintiffs so request." Opinion and Order, dated Sept. 30, 1991, at 8.

On November 27, 1991, the Administrator provided the Court with a declaration under penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies, through an authorized agent, to the effect that the compliance reports consisted of and/or were based upon corporate business records. Plaintiffs never availed themselves of the opportunity to conduct discovery of the defendant companies with respect to their compliance reports. On April 2, 1992, Interim Administrator Ellis circulated a letter in which he indicated that the LDF did "not intend to conduct any further investigation concerning the compliance reports." The Interim Administrator's letter makes no reference to any request by the LDF for an evidentiary hearing concerning the validity of the compliance reports. On April 7, 1992, the Court restored the pending motion to modify or vacate the *Patterson* Consent Decree to its calendar for consideration.

After some additional briefing, in an Opinion and Order dated July 8, 1992, this Court granted the motion of defendants Times, Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU and terminated the Consent Decree in its entirety.[5] The Office of the Administrator was retained only to the extent necessary to complete the processing of claims filed prior to the date of the Order—no new claims were to be initiated or processed.

Subsequently, however, the LDF and the EEOC filed a joint motion pursuant to Rule 59(e), Fed.R.Civ.P., seeking to alter or amend the Judgment or Order, dated July 8, 1992. The motion sought to establish a thirty-day grace period in which individuals could file claims regarding matters that accrued prior to July 8, 1992. On July 29, 1992, following

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[5] Familiarity with the Court's Decision is presumed.

oral argument, the Court denied that motion, ruling instead that it would enter a Judgment Order authorizing the Administrator to hear and decide all claims instituted prior to July 29, 1992. The LDF filed a Notice of Appeal from the July 29, 1992 Judgment Order on August 28, 1992, and the EEOC filed a Notice of Appeal from that same Judgment Order on September 25, 1992.

DISCUSSION

The LDF requests, pursuant to Rule 62(c), Fed.R.Civ.P., restoration of the Consent Decree pending appeal of the Judgment Order entered on July 29, 1992, vacating the Consent Decree and concomitant Settlement Agreement in their entirety.[6] The LDF alleges that since the termination of the Decree, various defendant employers and the NMDU have engaged in numerous discriminatory and retaliatory actions against minority employees with the intention of wearing them down and discouraging them from standing up for their rights. LDF Memo. at 6-11. Submitted to substantiate the allegations of the LDF are the Declarations of ten minority individuals.

Rule 62(c), Fed.R.Civ.P., provides in pertinent part:

> When an appeal is taken from in interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the

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[6] While the LDF's motion is titled "Motion to Restore Injunction Pending Appeal," a review of the Memorandum accompanying the motion evidences the LDF's intention to seek restoration of the entire Consent Decree, not simply Paragraphs 1 and 2, the permanent injunction provisions. *See* LDF Memo at 15 ("[N]on compliance requires the restoration of the decree—and particularly the permanent provisions in Part A and the administrative provisions in Part B—pending appeal.") The motion is thus more akin to one seeking reconsideration of the Court's prior decision terminating the Consent Decree in its entirety.

> pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c) is an exception to the general rule that jurisdiction passes to the appellate court once a timely notice of appeal is filed. The Rule "does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court." *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982). Rather, Rule 62(c) codifies the limited right of the trial court to grant only such relief as may be necessary to preserve the status quo pending an appeal where consent of the Circuit Court has not been obtained. *See Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc*, 847 F.2d 1014, 1018 (2d Cir. 1988); *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 758-59 (2d Cir. 1977).

The LDF filed its appeal of the Judgment Order dated July 29, 1992 on August 28, 1992, thereby vesting in the Second Circuit Court of Appeals jurisdiction over the instant action. Accordingly, this Court may act only to maintain the status quo during pendency of that appeal. Because the status quo as of July 8, 1992, the date of the Court's Opinion and Order terminating the Decree, is that the Consent Decree is of no force and effect, restoration of the Decree based on allegations that the Union and some of the defendant employers have engaged in acts of discrimination subsequent to its termination would be beyond the authority of this Court. While the LDF's Rule 62(c) motion could be denied on this basis alone, the Court believes that a discussion of the Rule 62(c) standard as it applies to the facts of this case is instructive

The criteria to be used in determining whether an application under Rule 62(c) should be granted are much the

same as would be employed on application for a preliminary injunction. Thus, to secure the relief sought in the present case, the LDF must (1) make a strong showing that it is likely to succeed on the merits of the appeal; (2) establish that unless the Consent Decree is restored, the private plaintiffs will suffer irreparable injury; (3) show that restoration of the Decree's provisions will not substantially injure other parties interested in the proceeding; and (4) show that the public interest favors restoration of the Consent Decree. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987); *United States v. Int'l Brotherhood of Teamsters*, 728 F.Supp. 920, 923 (S.D.N.Y. 1989).

A. Likelihood of Success on the Merits

This Court adheres to the reasoning set forth in its Opinion and Order dated July 8, 1992, terminating the Consent Decree in its entirety. Accordingly, an extensive exposition of the reasons why the Court believes the LDF is not likely to succeed on the merits of its appeal is unnecessary, and the Court will confine itself to a few brief remarks on this point.

As the Court has noted previously, the Consent Decree was "designed to correct the . . . statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." *See* Settlement Agreement, Whereas Clauses. The attainment of 25% minority employment industry-wide was the standard established for measuring compliance with this objective. Minority representation in the membership of the NMDU in the newspaper industry in metropolitan New York was less than 1% when the Consent Decree was issued in 1974. As of March 30, 1992, minority representation was proven to be 27.78% industry-wide. Thus, the stated objective of the affirmative action program set forth in the Consent Decree--25% minority employment industry-wide--has been achieved.

Finding that the purposes of the litigation as incorporated in the Consent Decree had been achieved, *see United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968), this Court terminated the Decree.

Contrary to the apparent belief of the LDF, the Decree nowhere states that it should remain in effect until each and every claim of discrimination is resolved. *See* LDF Memo. at 17. Indeed, it is inconceivable that the defendants would have entered into an agreement, the termination of which depended solely upon the unilateral decisions of employees regarding whether or not to charge a given employer with acts of discrimination. Vacation of the Consent Decree, however, does not permit defendants to discriminate against minorities in employment decisions. Title VII and other similar laws remain in effect and are fully applicable to defendants. If subsequent events disclose continuing discrimination, the LDF has every right to proceed against the alleged wrongdoer(s) in a new action,

B. Irreparable Injury

Pointing to what it alleges to be discriminatory acts occurring in the workplaces of certain defendant employers, the LDF argues that the dissolution of the Consent Decree and the "freeing of defendants from its restraints and from the immediate, ongoing supervision of the Interim Administrator has already resulted in substantial injury to minority workers." LDF Memo. at 17. The LDF has failed to establish, however, that vacation of the Consent Decree leaves any minority individual irreparably harmed, if, in fact, it is later determined that the alleged conduct was unlawful. There are numerous avenues open to those individuals who allege that they have been the victims of discrimination: an individual may bring a claim before the EEOC; the New York State Division of Human Rights; an arbitrator under the applicable labor agreement, or the NLRB if the Union breaches its duty of fair representation by denying proper

access thereto; and, of course, the courts, without exhausting Title VII administrative requirements, by commencing an action under 42 U.S.C. § 1981.

The vague references to the alleged pressure on minorities to accept buyouts from their employers and the allegations that minorities are given less desirable jobs because of their race or in retaliation against those who speak out when things are not done by the rules do not suffice to convince the Court that irreparable harm will result if the Decree is not reinstated. Restoration of the Consent Decree would only afford the individuals allegedly discriminated against one more forum, albeit a familiar and convenient one, in which to pursue their claim.

C. Injury to Other Parties if the Consent Decree is Restored

It is no argument to say, as the LDF does, that mere compliance with the law will shield the defendants from any injury that may come to them from restoration of the Consent Decree. Such an argument overlooks the fact that under the terms of the Settlement Agreement, each defendant is responsible for its share of the costs of the Administrator's services, regardless of whether that particular defendant has been charged with, much less been proved to have committed, discriminatory acts. As this Court noted in its Opinion and Order dated July 8, 1992, the expenses attendant to maintaining the office of the Administrator are substantial. *See* Opinion at 12, 15, n. 11. Accordingly, the Court adheres to its belief that the more equitable solution--given the fact that the goal of 25% minority employment in the newspaper industry represented by the NMDU has been exceeded—is dissolution of the Consent Decree, so that those employers who have demonstrated an ability to police themselves may be freed from the expense of processing charges against other employers.

D. The Public Interest

The plaintiffs have not demonstrated that the public interest would be served by restoration of the Consent Decree. Public confidence in the law will be increased with the denial of the LDF's application, and, should it be warranted following the commencement of a new action, the design of a remedial scheme better suited to redressing continuing discrimination, if any, that may be proved thereafter.

CONCLUSION

For the foregoing reasons, the LDF's motion to restore the Consent Decree pending appeal of the Judgment Order of this Court, dated July 29, 1992, is denied.

Supreme Court, U.S.
FILED
JUN 10 1994
OFFICE OF THE CLERK

(3)

No. 93-1784

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, ET AL., PETITIONERS

v.

NEWSPAPER AND MAIL DELIVERERS UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standards for modifying consent decrees set forth in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), and *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), apply to cases involving non-governmental defendants.

2. Whether the termination of the consent decree in this case was consistent with *Dowell* and *Rufo*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 13 F.3d 33. The opinion of the district court (Pet. App. 100a-121a) is reported at 797 F. Supp. 1174.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1993. A petition for rehearing was denied on February 7, 1994. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on May 9, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Newspaper and Mail Deliverers' Union (NMDU) controls access to jobs in the newspaper delivery industry in the New York City area. Pet. App. 2a. From 1901 until 1952, NMDU was an all-white union that limited its membership to the first-born, legitimate sons of union members. *Id.* at 2a, 20a. In 1952, with the cooperation of the area's newspapers and publishers, NMDU adopted a series of work rules that theoretically opened up employment opportunities to the entire labor force. *Id.* at 2a-3a, 20a-21a. In practice, however, friends and relatives of union members continued to receive favored treatment and minorities continued to be excluded from industry jobs. *Id.* at 21a. As of 1973, minorities constituted 30% of the qualified labor pool, but only 2% of the deliverers. *Id.* at 4a, 21a-22a.

In that year, minority deliverers and the Equal Employment Opportunity Commission (EEOC) filed suit against NMDU and the newspapers and publishers in the New York City area (respondents). They alleged that the 1952 system perpetuated discrimination against minority workers in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 3a. In 1974, after the case was tried but before the district court issued a decision, the parties entered into a settlement agreement that was incorporated into a consent decree. *Id.* at 3a-4a.

The decree contained four operative components. First, it permanently enjoined respondents from discriminating against minorities. Pet. App. 4a. Second, it provided for the appointment of an Administrator to implement the provisions of the agreement. The Administrator was to have a five-year term, which could be extended "as the Court may direct." *Ibid.* Third, the agreement established "a minimum goal of 25% minority

employment in the industry . . . by June 1, 1979." *Id.* at 4a-5a. Specific hiring ratios were established to facilitate the achievement of that goal. *Id.* at 5a. Finally, the decree contained specific provisions related to the hiring process, such as the establishment of application procedures. *Ibid.* The purpose of the decree was "to correct the * * * statistical imbalance [in the industry], to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the * * * statistical imbalance not existed." *Id.* at 4a.

By 1979, the year the 25% goal was to have been met, minorities constituted only 13.3% of those employed in the industry. Pet. App. 5a. In that year, the court extended the Administrator's term for another five years. *Ibid.* In 1984, the court extended the Administrator's term indefinitely. *Ibid.*

2. In 1985, respondents moved to vacate the decree on the ground that the 25% goal had been attained. Pet. App. 5a. The court deferred consideration of the motion until further evidence was produced that the goal had been met industry-wide. *Id.* at 6a. In 1988, based on preliminary evidence on that issue, the court suspended the decree's hiring ratios pending the resolution of the motion to vacate. *Ibid.* In 1991, the Administrator verified that the industry had achieved 25% minority employment, and the district court scheduled a hearing on the motion to vacate. *Ibid.*

Petitioners opposed vacation of any part of the decree. Pet. App. 6a. The EEOC did not oppose eliminating the affirmative action provisions or the Administrator, but it sought to retain the permanent injunctions against discrimination and several other provisions designed to ensure nondiscriminatory hiring. *Ibid.*

The district court granted respondents' motion to vacate the decree in its entirety. The court held that "[t]he Settlement Agreement is one cohesive document the goal of which was to increase minority employment in the industry to 25%." Pet. App. 116a. Because that goal has been accomplished, the court concluded, "the Decree has served its purpose, and its vacation, consistent with the intent which accompanied its entry, is appropriate." *Id.* at 117a.

In reaching that conclusion, the court rejected the argument that under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), only a "grievous harm" evoked by new or unforeseen conditions could justify vacating a consent decree. Pet. App. 107a. The court held that *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), and *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), had established a more flexible standard, permitting a decree to be vacated when its essential purpose has been achieved. Pet. App. 107a-109a.

The court also rejected the argument that continuing discrimination by respondents precluded vacating the decree. The court held that even assuming that respondents "have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree." Pet. App. 114a. The court concluded that "the only fact relevant to the issue of whether to terminate the Consent Decree [is] whether the 25% minority employment goal has been achieved." *Id.* at 115a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court held that the district court had properly evaluated the motion to vacate under the flexible standard of *Dowell* and *Rufo*, rather than under *Swift's*

grievous harm standard. *Id.* at 7a-10a. The court concluded that the flexible standard "is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity." *Id.* at 9a. Rather, "[i]f a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective." *Ibid.*

Applying that standard, the court first addressed the affirmative action provisions in the decree. It concluded that the district court did not abuse its discretion in vacating those provisions. Pet. App. 10a-12a. Although it was "clear that the 25 percent figure [in the decree] was chosen with reference to the 1970 census figure of a 30 percent minority workforce," the court observed that "[n]evertheless, the decree does not suggest that its purpose is to achieve total parity, and the 25 percent figure, as a numerical goal, is stated in absolute terms, without any suggestion that it is subject to modification." *Id.* at 11a. In addition, "[b]oth the difficulty of achieving [the] 25 percent goal and the likelihood that the percentage of minorities in the blue collar workforce would increase were foreseeable in 1974." *Ibid.* Thus, while the district court "might have had discretion to raise the 25 percent figure as a remedy for not meeting it [a]s originally contemplated," that court "was surely entitled to conclude that such an increase was not required." *Id.* at 11a-12a. And if the percentage goal was not increased, it was proper for the district court to vacate the decree's hiring ratios once the 25% goal was met. *Ibid.*

With regard to the remainder of the decree, the court agreed with the district court "that the decree has served its purpose, and that all of its provisions may be ended." Pet. App. 12a. The court did not "decide that the District Court was required to vacate these additional provisions, only that it was entitled to do so." *Ibid.* The court explained that "[a]pplication of the flexible standard * * * entitles a court of equity to focus on the dominant objective of any decree and to terminate the entire decree once that objective has been reached." *Ibid.*[1]

ARGUMENT

1. The court of appeals erred in concluding that the dominant objective of the consent decree was to achieve the numerical goal of 25% minority representation in the newspaper delivery industry. That interpretation unduly emphasizes one remedial section of the decree to the exclusion of other sections of equal importance. In particular, that interpretation cannot be reconciled with the very first section of the decree which permanently enjoined respondents from discriminating on the basis of race. Pet. App. 123a-124a. On its face, that important prohibition is entirely independent of the provision setting a numerical goal of 25% minority employment and reflects the decree's larger purpose of ending pervasive discrimination in the newspaper delivery industry.

The court of appeals' interpretation of the decree also departs sharply from the normal understanding of the purpose of numerical goals. Under Title VII, such goals

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[1] At the outset of its opinion, the court of appeals had stated its conclusion that the district court "was entitled to vacate the entire consent decree since its essential purpose had been achieved." Pet. App. 2a.

are not ends in themselves. Rather, they are benchmarks to assist in the more fundamental goal of eliminating pervasive employment discrimination. *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 448-449, 477-478 (1986) (plurality opinion); *id.* at 486-487 (Powell, J., concurring in part and concurring in the judgment). Under the interpretation adopted by the court of appeals, however, the provisions prohibiting discrimination in the newspaper delivery industry were merely designed to facilitate the achievement of the numerical 25% employment objective. That interpretation of the decree turns Title VII remedial law upside down and elevates the achievement of numerical goals over the purpose of eliminating discrimination. Although parties are free to agree to remedies that a court could not order (*Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986)), a court should be reluctant to construe a Title VII consent decree in a manner that is so fundamentally at odds with the statute's underlying purpose.

Nothing in the language of the decree in this case shows that the parties were concerned solely or primarily with achieving 25% minority employment and that they had little or no interest in the goal of ending the pervasive discrimination that gave rise to the litigation in the first place. The general statement in the decree (Pet. App. 4a) that its purpose was "to correct the * * * statistical imbalance [in the industry], to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the * * * statistical imbalance not existed" does not suggest that the parties did not care about ending the industry's history of pervasive discrimination. Indeed, even the court of appeals recognized that this language could be read to support that broader purpose. *Id.* at 11a.

Because a primary purpose of the decree was to end pervasive discrimination in the newspaper delivery industry, the district court clearly erred (Pet. App. 114a-115a) in treating evidence that respondents were still actively engaged in such discrimination as irrelevant to the decision whether to terminate the decree. Similarly, the court of appeals was wrong (*id.* at 12a) to conclude that the district court had discretion to terminate the decree in the presence of such evidence. The flexibility of a court of equity to dissolve a consent decree does not include authority to dissolve a decree designed to end pervasive racial discrimination without an affirmative showing by defendants that such discrimination has either ceased or become insignificant.[2]

Although the court of appeals erred in approving the district court's dissolution of the consent decree, that error alone does not warrant this Court's review. The court of appeals' decision is case specific; it does not hold that satisfaction of a numerical goal in a consent decree always requires or even justifies that decree's dissolution. Indeed, the court of appeals expressly distinguished the decree in this case from one that

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[2] In some situations, a showing that a numerical goal has been reached might help to prove that pervasive discrimination had ended. Here, however, the decree required respondents to reach their 25% goal by 1979, and the goal was not reached until many years later. By then, the percentage of minorities in the qualified labor pool had increased substantially (to approximately 50%), so that there remained a very substantial disparity between the percentage of minorities in respondents' work force and the percentage of minorities in the qualified pool. Moreover, there is evidence in this case that respondents engaged in numerous instances of intentional discrimination during the life of the decree. Pet. 14-16. In these circumstances, respondents' satisfaction of the 25% goal could not constitute proof that pervasive discrimination had ended.

described its purpose in somewhat broader language. Pet. App. 11a. The holding here approves the district court's exercise of discretion in light of the particular language of the decree in this case. That fact-bound decision, while erroneous, does not conflict with the decision of any other court of appeals and does not appear to raise any issue of general importance.

2. Petitioners urge the Court to grant review to decide whether the standards that this Court announced in *Dowell* and *Rufo* for modifying decrees should apply in cases involving non-governmental defendants. This case, however, is not an appropriate one in which to resolve that question.

In *Swift*, 286 U.S. at 119, this Court stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" could justify vacating a decree. In *Dowell* and *Rufo*, this Court held that *Swift's* strict "grievous wrong" standard does not apply when governmental defendants seek to modify a decree. *Dowell*, 498 U.S. at 246-247; *Rufo*, 112 S. Ct. at 757-758. In *Dowell*, this Court held that a finding that a school district "was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely * * * [to] return to its former ways" would justify dissolution of a desegregation decree. 498 U.S. at 247. In *Rufo*, this Court held that a governmental defendant may obtain a modification of a consent decree by showing "that a significant change in circumstances warrants revision of the decree." 112 S. Ct. at 760. The court of appeals held that the "flexible" standards announced in *Dowell* and *Rufo* applied in this case, even though respondents are not governmental defendants. Pet. App. 9a-10a.

That holding, however, may not have been critical to the court of appeals' judgment. Because the court of

appeals concluded that respondents had achieved the main purposes of the decree by reaching 25% minority employment, it might well have arrived at the same result in this case even if it had not relied upon *Dowell* and *Rufo*. Accordingly, the question whether the court of appeals erred in relying on those decisions is not squarely presented by this case.

In addition, the court of appeals' holding was that the flexible standards announced in *Dowell* and *Rufo* apply when a decree "seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature." Pet. App. 9a. That holding does not conflict with the holding of any other court of appeals. The Seventh Circuit has indicated that a flexible standard applies in all cases. *In re Hendrix*, 986 F.2d 195, 198 (1993). The Sixth and Eighth Circuits have applied the more flexible standard only to cases involving governmental defendants, *Lorain NAACP* v. *Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), cert. denied, 113 S. Ct. 2998 (1993); *Epp* v. *Kerrey*, 964 F.2d 754 (8th Cir. 1992), but those circuits have not yet addressed whether or to what extent a flexible standard might also apply in cases involving non-governmental defendants. Finally, although the Federal Circuit refused to apply *Rufo* to purely "commercial disputes," it has indicated that *Rufo* applies to cases involving non-governmental "service" institutions, a category that might well include respondents. *W.L. Gore & Associates* v. *C.R. Bard, Inc.*, 977 F.2d 558, 561-562 (1992). The question whether a flexible standard would apply in a case like this one thus remains open in that circuit.

3. Finally, petitioners contend (Pet. 20-22) that the court of appeals' decision is inconsistent with *Dowell*, *Rufo*, and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992). In

those decisions, this Court held that a good faith effort to comply with a decree is a prerequisite to obtaining a modification of that decree. *Dowell*, 498 U.S. at 249-250; *Rufo*, 112 S. Ct. at 761; *Freeman*, 112 S. Ct. at 1450. Moreover, in *Freeman*, this Court held that a showing of good faith compliance with one portion of a decree can result in relief only from that specific portion of the decree. 112 S. Ct. at 1445-1446. Because respondents only demonstrated their compliance with one provision in the decree, petitioners contend that the court of appeals erred in approving the dissolution of the entire decree. Pet. 21-22.

Petitioners' argument assumes that achieving 25% minority employment was simply one purpose of the decree. While we agree with petitioners on that point, the court of appeals did not. As we have noted, the court of appeals concluded that achieving 25% minority employment was the essential purpose of the decree. If that premise is accepted, petitioners' showing that they met the 25% goal was sufficient to establish that the decree has served its purpose. Under *Dowell*, such a showing can justify dissolution of a decree. 498 U.S. at 247.

Petitioners' real disagreement is with the court of appeals' interpretation of the decree in this case. While we share that disagreement, that fact-specific issue does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

No. 93-1784

In The

Supreme Court of the United States

October Term, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

vs.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NEW YORK TIMES COMPANY

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's application of the standard for terminating consent decrees set forth in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. __, 116 L. Ed. 2d 867 (1992), to this case involving private, non-governmental defendants?

2. Did the Court of Appeals err in affirming the District Court's termination of this Consent Decree?

RULE 29.1 DISCLOSURE

The New York Times Company has no parent company. It owns interests in the following companies: International Herald Tribune U.S. Inc.; Donohue Malbaie, Inc.; Gaspesia Pulp and Paper Company, Ltd.; and Madison Paper Industries.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NEW YORK TIMES COMPANY

The New York Times Company, one of the Respondents herein, respectfully requests that this Court deny the instant petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered December 20, 1993.

STATEMENT OF THE CASE

The Statements of Petitioners and the Equal Employment Opportunity Commission are, in large part, satisfactory. However, Petitioners' presentation of certain aspects of the case, coupled with certain omissions, necessitates the following observations:

1. The Consent Decree entered by the District Court herein expressly recognized that Respondents did not admit or concede liability under Title VII of the Civil Rights Act and that there was no finding of discrimination against them. The parties agreed that there was merely a statistical underrepresentation of minorities in the delivery departments of the employers and the membership of the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"). The singular purpose of the Consent Decree, by its clear and express terms, was to "correct" this statistical imbalance and "put minority individuals in the position they would have occupied had the aforesaid statistical imbalance not existed".

Petitioners' failure to acknowledge, let alone present in their Petition, the controlling text of this Consent Decree speaks volumes about their repeated refrain that the Consent Decree was entered because of pervasive discrimination and can only be vacated when discrimination within the newspaper delivery industry has been eliminated. The purpose of the Consent Decree is set forth in its "Whereas" clause, which reads in full as follows:

> WHEREAS, the parties to these actions have agreed to the entry, upon this Court's approval, of a final Order adopting the provisions of this Settlement Agreement (hereinafter referred to as the "Order"), *without admission by any defendant of a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981, and without any finding by this*

Court that any defendant has discriminated against any person or persons because of race, color or national origin;

WHEREAS, there is, and has been at all times relevant herein, a *statistical imbalance of minority individuals* (i.e., all those persons defined by the Equal Employment Opportunity Commission as Black, Spanish-surnamed, Oriental and American-Indian), employed in the delivery departments of the defendant employers within the bargaining units represented by defendant NMDU and a *corresponding statistical imbalance* of NMDU members;

WHEREAS, the *relief provided by this Settlement Agreement is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed.*

(JA 56-57) (emphasis added).[1] The Consent Decree established a goal of 25% minority employment within the industry (JA 60-61: ¶ 7).[2] This goal was not "an inflexible quota, but an objective to be achieved by the mobilization of available personnel and resources

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1. Record citations are to the Joint Appendix filed below ("JA __") or the original record ("R __").

2. The 25% target covered regular situation and Group I positions. Implementation ratios designed to achieve the 25% goal provided that minorities be placed in 60% of all Group III positions and 50% of all Group I positions.

of the defendants ... in a good faith effort to maximize employment opportunities for minorities. . . ." (JA 61: ¶ 8).

2. Petitioners misstate the substance of certain prior proceedings, obfuscating the fact that attainment of the 25% target has long been recognized as the dominant purpose of this Consent Decree.

a. In approving the goal of 25% minority employment, neither Judge Pierce nor the Second Circuit held, as Petitioners state (Petition for Writ at 11), that because this target was time frame-specific it had to be modified if not achieved by June 1979. The pages cited from the District Court and Second Circuit decisions make clear that all that was decided was that June 1979 was the target date for attainment of the 25% goal and that the contemporaneous 1970 census data supported the 25% goal (App. 28a-29a, 44a). Nowhere in the Consent Decree nor the District Court or Second Circuit decisions is there an indication that the parties intended for the goal to vary based on changing labor market composition.

b. In denying a 1979 application to modify the Consent Decree by eliminating the role of the Administrator, Judge Pierce did not, as Petitioners state (Petition for Writ at 5), rely on the continued existence of claims of discrimination. The sole basis for Judge Pierce's decision was the statistical position of the industry in relation to the 25% goal (App. 60a). The pendency of ten to fifteen matters before the Administrator (App. 58a), though mentioned by the court in stating the context for the motion, was not offered as a reason for denying the application.

c. In November 1988, Judge Conner suspended the 3:2 and 1:1 minority/non-minority implementation ratios for placement on the Group III and I lists, respectively, because of their "direct impact on the minority employment goal", which had

reached 27.61% (JA 314). Petitioners' present position that no modification of the Consent Decree is appropriate since minorities are underrepresented (Petition for Writ at 16, 21 n. 11) and discrimination continues dictates that Petitioners should have protested suspension of the implementation ratios. Yet, Petitioners did not request reconsideration of the Order so holding nor move under 28 U.S.C. § 1292(b) for certification of this ruling for a possible interlocutory appeal, and Petitioners continued under the Consent Decree without the implementation ratios for almost four full years thereafter.

3. Petitioners' assertion (Petition for Writ at 16 n. 8) that Judge Conner accepted "as accurate" their assertion that minority representation in the labor force had increased to 42.4% in 1980 and more than 50% in 1990 is misleading. In 1987, without any evidence having been adduced, the District Judge responded to Petitioners' representation concerning the 1980 figure by stating "I will accept that as established" because "I don't think its really relevant" (JA 265). Moreover, The New York Times entered into the record a 1987 labor market study that concludes that minority representation in the labor force remained between 25% and 30% (JA 285-87, 292-96, 298), though like Petitioners' analysis that study was never formally addressed by the District Court because of its relevance ruling.

4. Petitioners fail to support their contention of pervasive continuing discrimination, particularly after the filing of Respondents' motions to vacate the Consent Decree. Over the Consent Decree's 18 years, tens of thousands of significant employment decisions were made relating to initial hire, placement on the lists, bidding for jobs, termination, and the like in a delivery industry employing several thousand workers. That there were 278 claims over the Consent Decree's life means that, on average, there were just 15 claims each year. As many as 92 of the approximately 170 claims heard between 1979 and 1992

involved applications by employees to transfer from one enterprise to another. Approximately another 37 claims involved other matters also not relating to discrimination. (JA 162-74, 234-37) The bare handful of instances of supposed discrimination to which Petitioners can point that were adjudicated by the Administrator after the filing of the motions involved fewer than 35 claimed "discriminatees" (App. 72a, 82a; JA 696).[3]

Finally, Petitioners cannot properly refer to the 29 affidavits and declarations submitted in 1991 as part of an offer of proof (Petition for Writ at 15) and several more affidavits submitted in 1992 as part of their motion to reinstate the Consent Decree

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3. The claim involving The New York Times Company and NMDU, which has been denominated Claim 186, is ongoing and may be appealed to the Second Circuit upon conclusion of its remedy proceeding. The claim arose at a time when employment of minorities in The New York Times delivery department exceeded the 25% target; the remainder of the industry was nearing the 25% target; this Court had issued its decision in *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984), just one year earlier and the spate of subsequent affirmative action decisions of this Court that confined *Stotts* had not yet issued; and there was considerable uncertainty regarding the parties' legal rights since Respondents' motions to vacate or modify the Consent Decree were pending before the District Court and undecided (JA 336-58, 498, 261, 273-76). Moreover, during the appeal on the merits to the District Court, The Times sided with Petitioners and defended the revised hiring list the Administrator had ordered from challenge by the NMDU (772 F. Supp. at 837 n. 6 [App. 82a n. 6 is incomplete]; JA 336-37, 353-57, 380, 386). Finally, Petitioners misstate the facts in asserting that one-half of 47 regular situation positions were filled by minority members "[a]s a result of the Administrator's subsequent orders" in this claim. The District Court stayed (and effectively nullified) an Order of the Administrator that would have compelled such a result in November 1991 after The New York Times, by motion, demonstrated that the 47 employees on the hiring list The Times and Petitioners had defended jointly would be elevated in time as required given their list position but that was necessary to prevent a stay the Administrator's Order from interfering with delicate collective bargaining negotiations (R., Document 249).

pending appeal (Petition for Writ at 17) as evidence of discrimination. In 1986, the District Court had instructed Petitioners to present all claims of alleged discrimination to the Administrator (App. 66a; *see also* App. 115a, 120a n. 16). The District Court held that Petitioners' knowing failure to avail themselves of that opportunity over a period of 5 years foreclosed these affidavits and declarations from being accorded any evidentiary significance (App. 120a n. 16). Accordingly, Respondents have never addressed the merits of these allegations, and they are no more than mere assertion at this point in the proceeding.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANOTHER COURT OF APPEALS, NOR DOES IT PRESENT A QUESTION THAT THIS COURT NEEDS TO DECIDE.

Petitioners assert that this case presents two important questions: first, whether *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. __, 116 L. Ed. 2d 867 (1992), overruled *sub silentio United States v. Swift & Co.*, 286 U.S. 106 (1932); and, second, whether the "flexible" modification standard *Rufo* endorses applies in cases like this one involving non-governmental defendants? The answer to the first question is that *Rufo* did not overrule *Swift* and *Swift* remains good law, as the Second Circuit noted (App. 8a), in a narrow category of cases. The answer to the second question is, as the Second Circuit held (App. 8a-10a), that more fundamental principles than whether a defendant is a governmental entity determine whether the "flexible" modification standard applies in a given case.

In *Rufo*, 116 L. Ed. 2d at 883-84, this Court rejected Petitioners' contention that it overruled *Swift* by explaining that it had long indicated that it was not appropriate to read *Swift* as foreclosing the vacation or modification of consent decrees in virtually all cases: "Our decisions since *Swift* reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees". This Court's decision in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 112 L. Ed. 2d 715, 727-28 (1991), was to the same effect, and *Rufo* and *Dowell* represent nothing more than the reaffirmation of this Court's flexible approach to consent decree modification in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

United Shoe indicated that the "grievous wrong" standard of *Swift* was highly fact-dependent, 391 U.S. at 248, a conclusion echoed and enlarged upon in *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 968-69 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). There, the Second Circuit foreshadowed its decision here by pointing out that the "grievous wrong" standard is applicable when the interests accommodated by a consent decree are relatively constant and the protections provided by the consent decree remain necessary. 706 F.2d at 969-71. *Swift* itself states:

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.... The distinction is between restraints that give protection to *rights fully accrued upon facts so nearly permanent as to be substantially impervious to change*, and those that involve the *supervision of changing conduct or conditions and are thus provisional and tentative.*

286 U.S. at 114 (emphasis added). Where, on the other hand, "institutional reform" is implicated because that which the consent decree regulates is multi-faceted and changing and there is a shifting mix of interests, including those of non-parties, a more flexible approach is ordinarily necessitated.

The instant case fits the *Carey* formulation for application of the "flexible" standard. As the District Court pointed out (App. 109a), and the Second Circuit affirmed (App. 9a), this Consent Decree affects a myriad of individuals who were not members of the plaintiff class when the case commenced. In 1991, in a case denominated Claim 230, the District Court tellingly made this point:

> Only five of the forty-two paragraphs in the Settlement Agreement relate solely to the members of the original private class. Paragraph 9 required specific employment action, long ago implemented, with respect to some of the named plaintiffs in the private action. Paragraphs 36, 37, and 38 provide for one-time monetary payments relating to members of the private class. These were paid long ago. Paragraph 39 defines the private class, and identifies Appendix B as a listing of the thirty-six individuals who were known by defendants at the time of execution of the Settlement Agreement to be members of the private class. All of the other paragraphs of the Settlement Agreement regulate the employment practices of the defendants with respect to any minority individual, and not just private class members.

Patterson v. NMDU, 760 F. Supp. 1087, 1093 (S.D.N.Y. 1991).

Additionally, employment opportunities of non-minority individuals are directly affected by several components of the Consent Decree, such as the 3:2 and 1:1 minority/non-minority implementation ratios that make placement upon and advancement up the hiring lists dependent upon race. *A fortiori*, it was hardly a giant leap for the courts below to conclude that this Consent Decree was a case of institutional reform though the regulated enterprises were in the private sector.

This Court's decisions make clear that the "flexible" modification standard is appropriately applied in private sector settings. *United Shoe*, like the instant case, involved a governmental plaintiff and private sector defendants. *Railway Employees v. Wright*, 364 U.S. 642, 647-48 (1961), also was a private institution case in which a flexible approach was applied. *Rufo* cited both these precedents, making clear that applicability of the "flexible " modification standard is dependent not at all upon whether the defendant is public or private sector but, rather, the nature of the rights involved and the extent to which others than those who are party to the litigation are affected. The problem this Court addressed was the modification of consent decrees in institutional reform settings and, quoting *Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989), this Court broadly defined such situations as those that "reach beyond the parties involved directly in the suit. . . . " 116 L. Ed. 2d at 885.[4]

With this said, it is apparent that the application of *Rufo* to the instant case was doctrinally sound and anything but unexpected. Even if, as the Second Circuit concluded, this was the first case to explicitly adopt *Rufo* in a private sector setting, it does not present

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4. In *Heath*, the Sixth Circuit Court of Appeals suggested that the *Swift* standard should be confined to commercial consent decrees that involve only the parties to the subsisting litigation. 888 F.2d at 110.

a novel or important issue or an unanticipated development warranting this Court's review.

II.

THE DISTRICT COURT AND COURT OF APPEALS PROPERLY CONCLUDED THAT RESPONDENTS COMPLIED WITH THE CONSENT DECREE, ACHIEVING ITS PURPOSE.

Petitioners assert that the Second Circuit erred in affirming the District Court's dissolution of the Consent Decree without considering the evidence they presented of pervasive and continuing discrimination. Petitioners' argument is factually and legally incorrect.

As indicated in the Statement of the Case, there is no evidence of pervasive, continuing discrimination. The record discloses a mere four adjudications involving fewer than 35 claimed discriminatees in the 7 years following filing of the motions to vacate. In view of the fact thousands of employment decisions are made annually by approximately 20 covered employers, the substantially discrimination-free experience of Respondents is an impressive one. Respondents argued successfully to the lower courts that the time has come for them to operate like the remainder of American industry and demonstrate that they are capable of remaining discrimination-free without the oversight of a costly consent decree apparatus. If Respondents are unable to do so, Petitioners have recourse under the panoply of federal, state, and local anti-discrimination laws (App. 12a, 115a-116a and 120a n.16, 121a, 131a).

Assuming *arguendo*, as did the District Court that substantial discrimination continues (App. 114a), vacation of the Consent Decree was appropriate nonetheless. The principal and overriding

purpose of this Consent Decree was to eliminate minorities' statistical underrepresentation. The target to which the parties agreed was 25%, not an indefinite number that fluctuated with supposedly changing minority representation in the labor market. *Cf. Youngblood v. Dalzell*, 925 F.2d 954, 956 (6th Cir. 1991). The 25% target was achieved and exceeded in the face of an industry recession and a substantial contraction of newspaper delivery jobs (JA 329-35, 360). Moreover, Petitioners did not and could not contest The New York Times's demonstration of a "carryover effect" (resulting from the great predominance of minorities toward the middle and bottom of regular situation and Group I lists) that will further elevate the percentage of minorities within the industry over time (App. 110a n.10).

The Second Circuit correctly observed that the District Court did not hold that it was required to vacate the Consent Decree under the instant circumstances. The District Court held no more than that it was entitled to do so given its considerable experience with the parties (App. 11a-12a, 113a-114a).[5] As such, the lower court decisions are of little precedential value. No court properly can conclude from these decisions that certain circumstances compel the vacation of another consent decree. Moreover, as EEOC recognizes (EEOC Opposition Brief at 9), this case is enormously fact-specific inasmuch as the lower courts decided that the dominant purpose of this Consent Decree was attainment of the

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5. This Court has emphasized the considerable deference that is to be accorded the judgments of a District Judge who has, as here, lived with a consent decree for over a decade. *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 216 (1947) (district court judge has a unique "feel of the case which no appellate printed transcript can impart", resulting "in a perspective peculiarly available to him alone"); *Railway Employees*, 364 U.S. at 648 (district judge must have "wide discretion" since "there is such a balance of imponderables"); *United States v. Paradise*, 480 U.S. 149, 184 (1987) ("firsthand experience with the parties" renders district judge "best qualified" to assess circumstances of case).

25% target. Any consent decree written more broadly to require other than the elimination of a specified statistical imbalance will fall outside the compass of this case.

For these reasons, this case does not present a substantial and important question warranting this Court's review.

III.

THE DECISION OF THE COURT BELOW WILL PROMOTE THE PUBLIC POLICY OF ENCOURAGING THE SETTLEMENT OF TITLE VII CASES.

Petitioners' contention that the public policy favoring settlement of Title VII cases will be undermined by this case (Petition for Writ at 22) misses the mark completely. The Second Circuit decision advances that policy.

In the ordinary case, defendant companies and labor unions would have no incentive to enter into consent decrees if the law provided that vacation of a consent decree was impossible until a non-discriminatory nirvana exists. Absent consent decree language *specifically* providing for a completely discrimination-free workplace, defendant companies and unions must know that substantial compliance with the obligations of a consent decree will entitle them to relief from its terms.

Plaintiffs will not be deterred from entering consent decrees under the "flexible" modification standard. They enter such settlements knowing that "substantial compliance" is the touchstone for modification and, depending upon the strength of each case, can negotiate terms conducive to that standard.

This analysis is consistent with that of the Second Circuit in this case (App. 10a). No matter how much Petitioners attempt a

revisionist outlook now, the Consent Decree they entered clearly established elimination of a specified statistical imbalance — not elimination of discrimination or even labor market parity — as the objective for attainment. This was not irrational under the circumstances since the evidence, credited by the District Court, was that the exclusion of minorities was the result not of racial animus but NMDU's nepotistic policy of favoring members' relatives (App. 21a). Petitioners' entire policy argument fails as a result of their refusal to acknowledge these realities. This is not to say that every consent decree flowing out of a disparate impact case only may establish as its purpose attainment of a predetermined statistical target. Rather, that is what these parties did at a very early stage in the evolution of Title VII. The wide variety of settlements that are possible, coupled with subsequent recognition that more specific termination provisions than that used here are imperative, underscores that this case is unique and not of great moment.

The parade of horribles about which Petitioners warn is also imaginary. Despite Respondents' supposed "intransigence" (Petition for Writ at 24), Petitioners failed to avail themselves of the ample opportunity the District Court accorded them to present a supposed legion of discriminatory acts to the Administrator for adjudication to prove Respondents' recidivism. The District Court had instructed Petitioners to follow this course in 1986. The Consent Decree was not dissolved until 1992. The District Court hardly vacated the Consent Decree precipitously. Indeed, it seems manifest from the District Court's careful consideration of *Swift* that had Petitioners adduced evidence of pervasive, continuing discrimination by actually adjudicating the numerous cases they maintained they could prove, the District Court would have entertained the argument that the "dangers, once substantial," of minority representation falling below the 25% target had not "become attenuated to a shadow" (App. 98a, 107a). Petitioners denied themselves their sole opportunity to analogize this situation

to *Swift* by failing to follow the District Court's instruction as to how they could create such a factual record.

A fortiori, this case is not the seed from which the lower courts will be overrun by Title VII litigation. The prudence with which the District Court conducted itself in relieving Respondents of this particular Consent Decree, *sui generis* as it is, makes clear that allowing this decision to stand will not defeat the public policy favoring settlement of Title VII cases. To the contrary, the lower courts' pragmatic and common sense approach advances this policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

—v.—

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT DAILY NEWS, L.P.'S BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED

Was the trial court's decision, unanimously affirmed by the Court of Appeals, to vacate the consent decree because its essential purpose had been achieved an abuse of discretion?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, Respondent Daily News, L.P. has no parent companies and no subsidiaries.

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No. 93-1784

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN PATTERSON, et al.,

Petitioners,

—v.—

NEWSPAPER AND MAIL DELIVERERS UNION, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT DAILY NEWS, L.P.'S BRIEF IN OPPOSITION

Respondent Daily News, L.P. opposes the petition filed by John R. Patterson, Roland J. Broussard and Elmer Stevenson, on their own behalf and on behalf of all other persons similarly situated ("Petitioners") for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit entered in this proceeding December 20, 1993, reprinted in the appendix to the petition. (Pet. App. 1a-12a)[1]

[1] References to pages in Petitioner's appendix are designated as "Pet. App. ___." References to pages in the petition are designated as "Pet. Br. ___."

STATEMENT OF THE CASE

Petitioners seek review of a unanimous affirmance of the District Court's vacation of a consent decree based on the District Court's finding that the essential purpose of that consent decree had been achieved.

A. The Proceedings Below

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC"), brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union.[2] Both lawsuits alleged that the defendants had discriminated against minorities in violation of 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and 24 U.S.C. § 1981. (JA 1-38)[3]

On September 19, 1974, then District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree. *Patterson v. NMDU*, 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied sub nom. Larkin v. Patterson*, 427 U.S. 911 (1976). (JA 39-49) As described more fully below, the Settlement Agreement provided for an affirmative action program, the appointment of an Administrator, as well as injunctive relief. (JA 50-99) The stated "Goal" of the Settlement Agreement was the attainment of "25% minority employment in the industry." (JA 60 at ¶ 7)

In October 1974, Judge Pierce appointed William S. Ellis, Esq. as Administrator. (JA 47-49) Ellis has served as Administrator

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[2] The original 1973 actions named the New York News, Inc., the then publisher of the *Daily News* (the "News"), as a defendant. In 1991 the News was sold to Maxwell Newspapers, Inc. ("Maxwell"). In 1992, Daily News, L.P. acquired from Maxwell in bankruptcy the operating assets associated with the publication of the *Daily News*.

[3] References to "JA" are to the Joint Appendix filed below on March 12, 1993.

throughout the entire life of the Consent Decree. In February 1982 this case was reassigned to Judge William C. Conner. (JA 131)

In April 1985, a number of the defendants, including the News, moved to vacate the Consent Decree on the grounds that the 25% minority employment goal had been substantially achieved. (JA 240-43) On February 23, 1987, after a hearing to consider defendants' motion to vacate the Consent Decree, Judge Conner ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." (JA 273-76) Accordingly, the District Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment had reached 25% industry-wide. (JA 272-73)

In November 1988, after finding that the goal of 25% minority employment in the industry had been surpassed, the District Court suspended the affirmative action provisions of the Consent Decree that had a direct impact on the minority employment goal until the Court ruled further on defendants' motions to vacate the Decree. (JA 312-14)

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, the District Court restored defendants' motion to vacate the Consent Decree to its calendar. (JA 541-42) On September 30, 1991, the District Court issued an opinion and order in which it deferred consideration of defendants' motion to vacate the Decree so that the concerns of plaintiffs' counsel, the NAACP Legal Defense Fund (the "LDF"), respecting the validity of the compliance reports could be addressed. *Patterson v. NMDU*, 772 F. Supp. 1439 (S.D.N.Y. 1991). (JA 580-83) In this regard, the District Court ordered the following conditions be satisfied before it would consider the pending motions: (1) that each defendant company file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; and (2) that the LDF and the EEOC take, if desired, limited discovery concerning the compliance reports; and (3) that upon plaintiffs' request, the Administrator was to conduct

an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports.[4] (JA 583)

On July 8, 1992, the District Court issued an opinion and order vacating the Consent Decree in its entirety. *Patterson v. NMDU*, 797 F. Supp. 1174 (S.D.N.Y. 1992). (JA 690-701) On July 29, 1992 the District Court modified its July 8 order to permit the Administrator to hear and decide all claims instituted on or before July 29, 1992. (JA 709-10)

Timely Notices of Appeal were filed by private plaintiffs (JA 711-19), and by the EEOC (JA 790-95). On September 30, 1992, the District Court denied a motion by private plaintiffs to restore the Consent Decree pending appeal. *Patterson v. NMDU*, 802 F. Supp. 1053 (S.D.N.Y. 1992). (JA 796-801)

On December 20, 1993 the Court of Appeals issued an opinion unanimously affirming the District Court's opinion and order of July 8, 1992. *Patterson v. NMDU*, 13 F.3d 33 (2d Cir. 1993) (Pet. App. 1a-12a) Petitioners then filed a petition for rehearing with the Court of Appeals, which contained a suggestion that the appeal be reheard in banc. By Order dated February 7, 1994, the Court of Appeals denied that petition. (Pet. App. 13a-14a)

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[4] Pursuant to the District Court's September 30, 1991 opinion and order, on November 27, 1991, the Administrator provided the Court with a declaration under penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies to the effect that the compliance reports consisted of and/or were based upon corporate business records. *Patterson v. NMDU*, 797 F. Supp. 1174, 1177-78 (S.D.N.Y. 1992), *aff'd*, 13 F.3d 33 (2d Cir. 1993). (JA 693-94) Neither the LDF nor the EEOC availed themselves of the opportunity to conduct discovery of the defendant companies with respect to the compliance reports. (*Id.*) In addition, neither the LDF nor the EEOC requested that the Administrator conduct an evidentiary hearing as to the validity of the reports. (*Id.*)

B. Statement of Facts

1. Background

The nature of the delivery industry is such that employers' needs for delivery department employees vary depending on the size and quantity of the publication being distributed. In general, each employer maintains a work force of Regular Situation Holders for its minimum delivery needs and supplements that work force with daily shapers. Daily shapers are divided into group hiring lists with descending hiring priorities. Shapers on the Group I list have first priority after the Regular Situation Holders, in the order of their shop seniority. The next priority belongs to shapers on the Group II list followed by Group III shapers. (JA 42)

2. The Consent Decree

At the time of the commencement of these lawsuits, minority employment in the delivery industry was less than 2%. (JA 41) The preamble to the Settlement Agreement fully acknowledges the "statistical imbalance" that existed in the delivery industry in the early 1970s. (JA 57) In resolving the then pending litigations, the parties agreed to the terms of the Settlement Agreement, the purpose of which was to remedy the "statistical imbalance" in the industry by the attainment of a 25% minority employment goal.[5] (JA 60 at ¶ 7) The 25% goal is defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by the NMDU." (JA 60-61 at ¶¶ 7-8)

The Consent Decree expressly recognized that defendants did not admit liability and that there had been no finding of discrimination against any person. (JA 56) The parties agreed that there was merely a statistical imbalance of minorities in the delivery departments of the defendant employers and, concomitantly, the

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[5] "Employment" is defined as the employment of individuals in Regular Situation positions or as persons on Group I lists. (JA 60 at ¶ 7)

membership of the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"), which represents delivery department personnel. (JA 57) The singular purpose of the Consent Decree, by its clear and express terms, was to "correct" this statistical imbalance and "put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." (JA 57)

Each of these precepts was embodied in the "Whereas" clause of the Consent Decree, which reads in full as follows:

> WHEREAS, the parties to these actions have agreed to the entry, upon this Court's approval, of a final Order adopting the provisions of this Settlement Agreement (hereinafter referred to as the "Order"), *without admission by any defendant of a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981, and without any finding by this Court that any defendant has discriminated against any person or persons because of race, color or national origin*;
>
> WHEREAS, there is, and has been at all times relevant herein, a *statistical imbalance of minority individuals* (i.e., all those persons defined by the Equal Employment Opportunity Commission as Black, Spanish-surnamed, Oriental and American-Indian), employed in the delivery departments of the defendant employers within the bargaining units represented by defendant NMDU and a corresponding statistical imbalance of NMDU members;
>
> WHEREAS, the *relief provided by this Settlement Agreement is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed.*

(JA 56-57) (emphasis supplied)

The Settlement Agreement is divided into four sections: Equitable Relief (JA 57-58 at ¶¶ 1-2), The Administrator (JA 59-60 at ¶¶ 3-6), Affirmative Action Program (JA 60-73 at ¶¶ 7-27), and General Provisions (JA 74-85 at ¶¶ 28-42).

The Equitable Relief provided for in the Consent Decree enjoined both the NMDU and the defendant employers from engaging in any act or practice which had the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. (JA 57-58 at ¶¶ 1-2)

As the means for achieving the 25% minority employment goal, the Consent Decree established an Affirmative Action Program which set specified ratios for the employment and the advancement of minority persons. In particular, the Affirmative Action Program required that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. (JA 65 at ¶ 11) In addition, for every two non-minority persons added to the Group III list, three minority persons had to be added. (JA 67 at ¶ 15) Regular Situations were to be filled as they became available from the Group I list based solely on seniority.[6] (JA 64 at ¶ 10(c))

The Consent Decree also provided for the establishment of an Administrator, appointed by the District Court, "to implement the provisions of the order and . . . supervise its performance." (JA 59 at ¶ 3) The Administrator was given substantial powers, including the power to hear complaints and decide questions of interpretation of the Consent Decree, subject to judicial review by the District Court. (JA 59 at ¶ 4) The Consent Decree also required the submission of periodic reports to the Administrator by the defendants indicating progress towards compliance with the 25% goal. (JA 60 at ¶ 7) All of the Administrator's compensation and expenses are paid for by the defendants. (JA 60 at ¶ 5)

3. Attainment of The Minority Employment Goal

The parties set June 1, 1979 as the initial target date for the attainment of the 25% minority employment goal. (JA 60 at ¶ 7) In the event that the goal was not reached by June 1979, the

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[6] As stated above, in November 1988, after finding that the goal of 25% minority employment had been surpassed, the District Court suspended the 3:2 and 1:1 ratios, as well as all other affirmative action provisions of the Decree that had a direct impact on the minority employment goal. (JA 312-14)

Settlement Agreement provided for the reappointment of the Administrator by the District Court "for such time as the [District] Court may direct." (JA 60 at ¶ 6) Accordingly, the District Court extended the Administrator's term pending the attainment of the 25% goal. (JA 116-17; JA 127-30; JA 250-51)

In February 1987, the District Court, while acknowledging that certain employers have met or exceeded the 25% goal, deferred its decision on the motion to terminate the Decree until defendants could demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry. (JA 272-73) On September 17, 1991, the Administrator issued a report in which he concluded that the minority employment figure industry-wide was at 27.97%. (JA 567-69)

4. The District Court Decision

On July 8, 1992, Judge Conner issued an opinion and order vacating the Consent Decree in its entirety. (JA 690-701) In reaching this decision, the District Court found that the purpose of litigation as incorporated in the Consent Decree was the attainment of the 25% minority employment goal (JA 696), and that it had the authority to vacate the Decree in its entirety upon the attainment of that goal. (JA 695-96) The District Court therefore held that "[s]ince the 25% goal has been attained, the Decree has served its purpose, and its vacation, consistent with the intent which accompanies its entry, is appropriate." (JA 699)

5. The Court of Appeals Decision

On December 20, 1993, the Court of Appeals issued an opinion unanimously affirming the District Court's opinion and order of July 8, 1992. (Pet. App. 1a-12a) The Court of Appeals agreed with the District Court that "[i]f a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when notification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objectives." (Pet. App. 9a) The Court of Appeals therefore ruled

that the District Court applied the correct legal standard for modification of a consent decree and was entitled to vacate the entire consent decree since its essential purpose -- 25% minority representation -- had been achieved. (Pet. App. 10a)

REASONS FOR DENYING THE PETITION

The Petition does not set forth "special and important" reasons for granting the writ. *See* Sup. Ct. R. 10.1. In particular, the decision of the Second Circuit Court of Appeals has not created a split among the Circuits with respect to the proper standard a court should apply in determining whether to modify a consent decree not designed to operate in perpetuity and arising from a litigation seeking institutional reform and affecting more than just the parties thereto. Rather, the decision of the Court of Appeals to apply a flexible standard under those circumstances is entirely consistent with Supreme Court precedent and is not in conflict with the decision of another United States Court of Appeals on the same matter.

In addition, the Court of Appeals properly affirmed the trial court's vacation of the Decree upon the trial court's finding that the purpose of the Decree had been achieved. Petitioners' argument that the Decree should not have been vacated because of "evidence" of noncompliance should be rejected because it is undisputed that the Decree's goal of a 25% minority work force was achieved. In any event, Petitioners did not below, and have not here, presented "evidence" of a consistent pattern of noncompliance with respect to the Decree. The trial court was well within its discretion in rejecting Petitioners argument of noncompliance given that the court had monitored compliance with the Decree for eighteen years.

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH SUPREME COURT PRECEDENT AND IS NOT CONTRARY TO THE DECISION OF ANY OTHER COURT OF APPEALS

A. The Court Below Correctly *Read U.S. v. Swift & Co.* As Limited To Its Facts

In arguing that the Court should grant its petition for a writ of certiorari, Petitioners state that "[t]he basis for the decision below was that the standard established for modifying or dissolving consent decrees established by *U.S. v. Swift & Co.*, 286 U.S. 106

(1932), has effectively been superseded by this Court's decisions in *Dowell* and *Rufo*." (Pet. Br. at 19) Petitioners misread the Court of Appeals' decision. The Second Circuit stated only that the caselaw "suggest[s] that *Swift* is a special case that should not be read as setting down a general standard for all future cases." (Pet. App. 8a) Thus, the Court of Appeals did not hold that *Swift* had been overruled by *Dowell* or *Rufo*, but was merely following the Court's precedent that *Swift* should be read as limited to its facts.

The Second Circuit was correct in reading *Swift* in this manner. This Court has stated that "*Swift* teaches that a decree may be changed upon an appropriate showing," and that the specific standard applied in *Swift*, i.e., "nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change,"[7] "must . . . be read in light of [its] context." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). The Court in *United Shoe Machinery Corp.* interpreted *Swift* as holding that the defendants must show grievous wrong only when the purpose of the decree has not been achieved or when a danger of reversion to the conditions which necessitated the decree still exist. 391 U.S. at 248. In contrast, where the purpose of the decree has been achieved and such a danger does not exist, such a showing is not required. *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991).

Later decisions of this Court have also recognized that the intent of the Court in *Swift* was not to make "grievous harm" the appropriate showing in every case involving a motion to modify a consent decree.[8] Rather, the language of *Swift* "must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed." *Dowell*, 498 U.S. at 247;

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[7] The fact that the consent decree in *Swift* by its terms was meant to operate in perpetuity, 286 U.S. at 116, and that the defendants had not complied in good faith with the decree (*id.*), contributed to the Court's finding that the appropriate showing was "grievous harm."

[8] *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992) ("[T]he 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees.")

United Shoe Machinery Corp., 391 U.S. at 248. "There is . . . little basis for concluding that Rule 60(b) misread the *Swift* opinion and intended that modifications of consent decrees in all cases were to be governed by the standard actually applied in *Swift*. That Rule, in providing that . . . a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard." *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992).

Swift does not provide the proper standard for modification of consent decrees that "are not intended to operate in perpetuity." *Dowell*, 498 U.S. at 248. Rather, the "District Court should address itself to whether the [defendant] had complied in good faith with the . . . decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Dowell*, 498 U.S. at 249-50.

The restraints imposed by the consent decree in the instant case, unlike those at issue in *Swift*, were never intended to operate in perpetuity. *See* JA 695. In addition, the decree in the instant action, unlike *Swift*, does not concern a commercial litigation but rather an institutional reform litigation that "sought to vindicate significant rights of a public nature." (Pet. App. 9a) Thus, the trial court below did not abuse its discretion by applying the flexible standard in determining whether to modify the decree and the Court of Appeals properly affirmed the trial court's use of that standard.

B. The Decision Below Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals On The Same Matter

Petitioners' argument that their writ of certiorari should be granted because "there is conflict between the circuits" "regarding the standard that should govern the dissolution of consent decrees" (Pet. Br. at 19) should be rejected because there is no such conflict between the circuits. Petitioners fail to cite to any decision of another United States Court of Appeals holding that a trial court may not use the flexible standard in an institutional reform litigation

between private litigants where the consent decree is not meant to operate in perpetuity. *See* Sup. Ct. R. 10.1(a).

Petitioners cite to four decisions in support of its assertion that "it is apparent that there is both conflict and uncertainty as to whether *Dowell* and *Rufo* overruled *Swift & Co.*" (Pet. Br. at 19) None of those decisions, however, hold that *Swift* was so overruled. Nor do any of them apply the rigorous standard for modifying a consent decree applied in *Swift* to a non-commercial case involving equitable principles and reform litigation.

In *In re Hendrix*, 986 F.2d 195 (7th Cir. 1993), the Seventh Circuit did not hold "that *Swift & Co.* was completely overruled by *Rufo*," (Pet. Br. at 19), but merely stated that although *Rufo* "involved institutional reform litigation, the 'flexible standard' . . . is no less suitable to other types of equitable case." 986 F.2d at 198. Further, the Court of Appeals' decision in *In re Hendrix* is perfectly consistent with the Court of Appeals' decision below in that it applied the flexible standard to a lawsuit involving private litigants.

Petitioners also cite to a Sixth Circuit decision, *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2998 (1993), and to an Eighth Circuit decision, *Epp v. Kerrey*, 964 F.2d 754 (8th Cir. 1992), for the proposition that "the Sixth and Eighth Circuits have only applied *Rufo* to cases involving governmental entities." (Pet. Br. at 19) The decisions cited by Petitioners, however, do not involve private parties in a reform litigation (as does the instant litigation), but rather merely follow *Rufo* by applying the flexible standard for modifying decrees in institutional reform litigations where the government is a party. Thus, they do *not* hold that the *Rufo* standard may not be applied in cases involving only private entities and therefore are not contrary to the Second Circuit's decision.

Finally, Petitioners, citing to *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992), state that "the Federal Circuit has declined to apply the *Rufo* standard to commercial litigation involving a private defendant." (Pet. Br. at 19) This holding is perfectly consistent with Supreme Court

precedent and the decision below that *Swift* is still viable, but limited to its factual circumstances. The Federal Circuit in *W.L. Gore* declined to apply the flexible standard because "commercial decrees affect only the parties to the particular suit, whereas institutional cases may impose action, or restrain action, in ways that transcend the persons involved in the suit and its settlement." *W.L. Gore*, 977 F.2d at 562. That holding is consistent with the holding below because the consent decree in the instant action was not designed to vindicate a public interest in eradicating vestiges of alleged discriminatory hiring. (Pet. App. 9a)

Thus, Petitioners fail to cite to any Court of Appeals decision holding that in a reform litigation involving only private litigants, the proper standard for determining a motion to modify or vacate a consent decree is the one set forth in *Swift*. Petitioners are also incorrect in arguing that the decision below held that *Swift* has been overruled. Hence, Petitioners have not shown any conflict between the decision below and the decision of any other Court of Appeals regarding the proper standard to be applied to a motion to modify or vacate a consent decree.

II. THE COURTS BELOW DID REQUIRE COMPLIANCE WITH THE CONSENT DECREE

A. The Courts Below Found That The Purpose of The Decree Had Been Achieved

The district court's power to vacate or modify a consent decree is subject to a finding by the court that "the purposes of the litigation as incorporated in the decree . . . have . . . been fully achieved." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). *See also Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991). In addition, the court must also consider whether there is a danger that the conditions which the parties sought to correct by entering the decree will resume if the decree is dissolved. *Dowell*, 498 U.S. at 247 ; *United States v. Swift & Co.*, 286 U.S. 106, 117 (1932).

Applying this standard, the District Court properly vacated the Consent Decree in its entirety after finding that the defendants had complied with their obligations under the Decree, the purpose of which -- 25% minority employment -- had been achieved. (JA 696). The District Court also found that the concerns which warranted the adoption of the Decree in 1974 no longer exist, and are not likely to reemerge. (*Id.* at n.10) The Court of Appeals correctly deferred to the discretion of the District Court with respect to these factual findings (Pet. App. 12a), as the District Court had monitored the Decree for eighteen years and thus was in the best position to determine whether defendants had substantially complied with the Decree.

In addition to the fact that the situation compelling the entry of the Consent Decree -- less than 2% minority employment -- has been eradicated, the District Court found that there was a foundation in place which suggested that minority representation would continue to increase notwithstanding vacation of the Decree. (JA 696 n.10) This increase would be the result "of the 'carryover' effect resulting from concentrations of minorities in lower seniority positions . . . coupled with increased voluntary attrition of more senior non-minority NMDU personnel." *Id.*

Petitioners mislead the Court in arguing that "it was clear error for the District Court to hold that whether the Defendants had continued to violate the Consent Decree was irrelevant to whether the decree should be dissolved" (Pet. Br. at 21), because the District Court made no such holding. Rather, in rejecting Plaintiff's request for a full evidentiary hearing on whether, *inter alia*, the industry had committed violations of the decree, the Court stated as follows:

> Such a hearing . . . is neither required nor necessary. In the instant case, *the Administrator, as well as the Court, has monitored compliance with the Settlement Agreement since its inception*. With respect to the instant motion to vacate or terminate the Consent Decree, the parties have presented extensive arguments to this Court in various motion papers, at a conference held on May 30, 1991, and at a hearing held on February 23, 1987. *There is, accordingly, a vast evidentiary foundation -- both statistical and experiential -- which this Court may explore in order to decide whether vacation of the Decree is appropriate*.

(JA 698) (emphasis added)

The Court thereafter merely stated in *dicta* that "[e]ven assuming, *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree." (*Id.*) Contrary to Petitioners' presentation, the District Court obviously made this statement in dicta to underscore its view based upon a "vast evidentiary foundation" that a hearing on petitioner's allegations was "neither required nor necessary." (*Id.*)

B. Petitioners Have Not Shown Evidence Of A Consistent Pattern of Violations Of The Decree

Petitioners argue that vacation of the Decree was improper because "plaintiffs presented substantial evidence that there had been a consistent pattern of violations of the decree" (Pet. Br. at 14), which demonstrates "bad faith" by Respondents (Pet. Br. at 21). This argument must be rejected, first and foremost, because the purpose of the Decree was *not* the transformation of defendants into a discrimination-free industry. The purpose of the anti-discrimination provisions of the Decree, like the implementation ratios, was to facilitate achievement of the 25% goal.

Petitioners' argument must also be rejected because there is no evidence that discrimination is pervasive within the industry. The District Court specifically rejected Petitioners' allegation that discrimination is rampant, noting that both the Court and the Administrator had monitored compliance with the Consent Decree since its inception and had thereby acquired "a vast evidentiary foundation" that informed their respective judgments. (JA 698) Against this backdrop, the District Court's acceptance of the Administrator's conclusion that the industry was in substantial compliance with the Consent Decree, 1991 Report at 9 (JA 564), warrants considerable deference.

Petitioners' blanket assertions that they have "presented substantial evidence that there has been a consistent pattern of violations of the decree" (Pet. Br. at 14), and that "the district court itself had held on a number of occasions *after* the motions to dissolve the injunction had been filed, that both the Union and various of the other defendants had violated the decree, and, indeed, had committed acts of intentional discrimination" (Pet. Br. at 20), are disingenuous and false. In support of these assertions, Petitioners cite to only four "examples" of such "evidence" (Pet. Br. at 14), and in none of those did the District Court make a finding of intentional discrimination.

With respect to Petitioners' first example (*id.*), the claim at issue concerned the Union's assertion that the affirmative action program in the Decree should be terminated as to the News because

minority employees at the News had at that time (1987) already constituted more than 25% of the work force. (Pet. App. 74a) The District Court rejected this argument because it found that the Decree "established a goal of 25% minority employment in the bargaining unit throughout the entire industry." (*Id.*) The Court therefore "refused to lift the decree as to individual employers even though they may have achieved the 25% goal." (*Id.*) This is thus not an example of a finding of intentional discrimination or of bad faith by Respondents.

With respect to Petitioners' second example (Pet. Br. at 14-15), the claim involves The New York Times and the NMDU and arose at a time when employment of minorities at The Times delivery department exceeded the 25% target; the remainder of the industry was nearing the 25% target; and this Court had issued its decision in *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984) just one year earlier and the spate of subsequent affirmative action decisions of this Court that confined *Stotts* had not yet issued. There was considerable uncertainty regarding the parties' legal rights since Respondents' motions to vacate or modify the Consent Decree were pending before the District Court and undecided (JA 336-58, 498, 261, 273-76). Petitioners misstate the facts in asserting that one-half of 47 regular situation positions were filled by minority members only as a result of the Administrator's orders. In fact, the District Court stayed (and effectively nullified) an Order of the Administrator that would have compelled such a result upon the motion of The New York Times. Petitioners should have noted that the claim is ongoing and may be appealed to the Second Circuit upon conclusion of its remedy proceeding. (JA 595-600)

With respect to Petitioners' third and fourth examples, Petitioners admit that they were findings of discrimination by the Administrator, which were settled between the parties *before* review by the District Court. (Pet. Br. at 15) Moreover, these findings involved only three employees out of a total over one thousand of employees covered by the Decree.

Finally, Petitioners also cite to an offer of proof submitted to the Court containing affidavits and declarations of 29 minority employees. This, of course, is not evidence of violations but

merely *allegations* of violations. Further, in view of the District Court's unambiguous directive that all complaints be referred to the Administrator, the only proper way for Petitioners to attempt to demonstrate that discrimination remained pervasive was to present these allegations to the Administrator. In any event, as the District Court stated, "the Decree nowhere states that it should remain in effect until each and every claim of discrimination is resolved." (Pet. App. 131a)

Thus, Petitioners' assertions that there is "evidence" of a consistent pattern of violations of the Decree and that the District Court made findings of intentional discrimination are not supported by the record evidence nor is there any evidence of industry-wide discrimination.[9] At most, Petitioners have presented evidence that the Administrator, before review by the District Court, made findings of discrimination as to the three employees which findings were ultimately settled.

III. THE DECISION OF THE COURT BELOW WILL NOT UNDERMINE THE SETTLEMENT OF CASES IN FEDERAL COURT

Petitioners' argument that "the decision below will substantially discourage plaintiffs from settling complex employment discriminations and other civil rights litigation" (Pet. Br. at 22) should be rejected because the exact opposite would result were the decision vacated on the grounds proffered. For the District Court to have refused to vacate the Decree, after its purpose had been accomplished, and thus require defendants to nevertheless continue to be bound by its extremely costly provisions, would surely discourage future defendants from entering into such decrees. As recognized by the Court of Appeals in its decision below: "For

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[9] Petitioners also disingenuously state that while "in 1987 Judge Conner found the evidence insufficient to establish that the industry as a whole had met the 25% goal," "in 1988 he suspended the 3/2 ratio for placing workers on the Group III list." (Pet. Br. at 16) Petitioners neglect to point out, however, that in the 1988 Order suspending the 3/2 ratio Judge Conner stated that "the percentage of minority employment is 27.61%." (JA 313)

Defendants . . . it is the prospect of modification as circumstances change or objectives are substantially reached that provides the incentive to settle on reasonable terms, rather than adamantly resist in protracted litigation." (Pet. App. 10a) Petitioners in effect seek to modify the Decree by having it remain in effect, notwithstanding the undisputed fact that the expressed goal of 25% minority employment had been met, until there is an end to allegations of discrimination in the industry. That was not the intent of the parties when the Decree was entered. To allow Petitioners to rewrite the Decree to change its expressed goal would be a blow to the certainty for which parties to a settlement certainly bargain. The District Court, with full knowledge of the history of the Decree, did not abuse its discretion in vacating the Decree after industry-wide attainment of 25% minority employment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN PATTERSON, *et al.*,

Petitioners,

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Petitioners wish to reply to the briefs in opposition to the petition for a writ of certiorari filed by respondent New York Times and by the Equal Employment Opportunity Commission.

I.

INTRODUCTION

The New York Times takes issue with a number of assertions made by petitioners in their Statement of the Case. Its objections are not well-founded.

1. The Times states that the Petitioners are wrong in stating that Judge Pierce relied in part on the continued existence of claims of discrimination in denying a 1979 application to modify the Consent Decree by eliminating the

role of the Administrator. Times Brief in Opposition, p. 4. The Times' characterization of Judge Pierce's decision is incorrect. He did not merely refer to a number of pending claims, but also held:

> In this regard, the proposed replacement of the Administrator with the EEOC and the Adjustment Board is not an acceptable alternative to maintaining the position of the Administrator. Under the proposed plan the central function of resolving claims of racial employment discrimination is to be referred to the Adjustment Board which consists of persons representing the very defendants who have been charged in these actions with having engaged in practices which resulted in the exclusion of minority employees in this industry. Indeed, some of the claims of employment discrimination which, under this proposal the Adjustment Board would be called upon to resolve, might well involve defendants who have representatives on the Board.

App. 60a.

2. The Times now attempts to argue that there is a dispute over whether the relevant workforce has grown to more than 50% minority. Times Brief in Opposition, p. 5. The point is that the district court accepted petitioners' argument that it had so increased but held that fact to be irrelevant as to whether the consent decree should be dissolved. Petitioners repeatedly urged that any dispute over the workforce should be decided; the Times was content to have the district court hold that the issue was irrelevant, and it cannot now attempt to rely on other facts that it alleges prove otherwise.

3. The Times claims that "Petitioners fail to support their contention of pervasive continuing discrimination" (Times Brief in Opposition, p. 5), wholly ignoring the fact that the Times argued successfully to the district court that it was irrelevant whether or not there was discrimination or

whether or not the decree was being violated. Of course, it was the *Times'* burden, as the party seeking to vacate the decree, to make some showing that it was in compliance with the prohibitory provisions. It utterly failed to do so, and cannot now rely on purported facts not found by the district court to suggest that the industry was free of discrimination.

4. The description in footnote 3 of the Times' Brief (Times Brief in Opposition, p. 6) of Claim 186 is totally self-serving. The Times and the Union jointly promulgated a new list that was clearly in violation of the explicit terms of the consent decree and in defiance of an explicit order of the Administrator not to do so. After a proceeding that took many months and over 6,000 pages of testimony, the Administrator held that both the Times and the Union were guilty of intentional discrimination and had violated the consent decree when they issued the list and filled positions from it. The district affirmed the order of the Administrator, finding that the action of the Times and the Union was "In direct contravention of both the Settlement Agreement and the Administrator's Order." App. p. 77a. Interestingly, the Times and the Union both argued, as does the Times here, that this Court's decision in *Firefighters Local No. 1784 v. Stotts*, 476 U.S. 561 (1984) somehow justified their acting contrary to the consent decree. The district court's response is still apt:

> [T]he Times and the NMDU took matters into their own hands in open disregard of the plain language of the Settlement Agreement and the explicit order of the Administrator. This they cannot do. A court order must be obeyed.

(App. p. 84a.)

5. The Times misstates the basis for the petitioners' proof that there continued to be serious and pervasive violations of the consent decree. Times Brief in Opposition, pp. 6-7. The offer of proof and subsequent affidavits were not proffered to the district court in order to have that court

adjudicate individual claims of discrimination and violations of the decree. Indeed, a number of the claims set out in those affidavits had also been presented to the Administrator for just such adjudications. The purpose of the submission was to demonstrate that the respondents had failed in their obligation to comply in good faith with the consent decree over a reasonable period of time. Thus, they could not demonstrate the compliance that is an absolute prerequisite to obtaining a modification of, let alone a dissolution of, a consent decree. *Freeman v. Pitts*, 503 U.S. ___, 118 L. Ed. 2d. 108, 139 (1992).

6. Finally, the Times continues to make much of the introductory paragraphs of the consent decree, which contain boilerplate language, insisted on by all defendants as a condition for settlement, that they did not admit any violation of Title VII or 42 U.S.C. § 1981 by entering into the settlement. This argument ignores the fact that when the district court approved the decree, which was being challenged by non-minority workers, it made detailed findings concerning practices in the industry that perpetuated the effects of past discriminatory policies, and resulted in the nearly total exclusion of minorities from the industry. App. pp. 20a-22a. These findings were affirmed on appeal to the district court and are binding on the Times for the purpose of this proceeding. App. pp. 40a-41a.

II.

THIS CASE INVOLVES IMPORTANT ISSUES CONCERNING THE ADMINISTRATION OF CONSENT DECREES THAT ARE UNSETTLED

The Equal Employment Opportunity Commission agrees with petitioners that the case was wrongly decided below; the New York Times, of course, urges that the court below was correct. Both urge that this Court should not review the decision below whether it is right or wrong. Both are mistaken.

A. Does *Rufo* overrule *Swift*?

It is clear that there is great confusion in the lower courts as to whether the standard established by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L. Ed. 2d 867 (1992) does or does not govern all consent decrees entered by a federal court, or only those involving public defendants. We have set out the varying views of the Seventh, Sixth, Eighth, District of Columbia, and Federal Circuits in the petition for a writ of certiorari at page 19, and will not repeat that discussion here. More recently, the Third Circuit, in *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 341 n. 15 (3rd Cir. 1993), noted the Seventh Circuit's view that *Rufo* overruled *United States v. Swift & Co.*, 286 U.S. 106 (1932). The Third Circuit stated that this was an open question that it would not resolve since the case before it involved a public institutional defendant. Clearly, the lower courts need guidance with regard to this important question.

B. The Conflict Over the Standard for Dissolving a Consent Decree Under *Rufo*.

As discussed at some length in the petition for certiorari, the district court here specifically held that it was irrelevant whether the defendants had violated the consent decree, and the court of appeals affirmed without even discussing the issue of compliance with all aspects of the decree. Thus, the Second Circuit applied a "flexible standard for modifying decrees" without any guidelines whatsoever as to what should govern a district court's discretion.

The decision below is in stark contrast to, and in conflict with, the approach of the Eleventh Circuit in the case of *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993). There, the court first held that the more flexible *Rufo* standard should apply to employment discrimination cases

where goals had been set.[1] However, the actual standards it held governed when a district court could vacate or dismiss a consent decree were much more stringent and explicit than the amorphous ones set out by the Second Circuit here. With regard to the requirement that good faith compliance must be shown, the Eleventh Circuit directed that "the district court should consider the City's record of compliance with the decree." 2 F.3d at 1508. Thus, "On remand, the district Court *must* reach the substantial compliance question to determine whether the City has acted in good faith." *Id.*, n. 38 (emphasis added). Further, the Eleventh Circuit held, contrary to the decision of the Second Circuit here, that the fact that the defendant had acted to remedy past discrimination was not enough. Rather,

> [T]ermination of the consent decree would be appropriate if the district court finds that the decree is clearly no longer necessary *either* to prevent discrimination in the future *or* to remedy the effects of past discrimination.

2 F.3d at 1508 (emphasis added).

Here, the district court, with the approval of the court of appeals held that it was irrelevant whether the prohibitory provisions of the decree were necessary to prevent future discrimination, because it was irrelevant that there was ongoing discrimination in the present. That conclusion was wrong, it was inconsistent with the decisions of this Court, and it is in conflict with the decision of the Eleventh Circuit.

And, contrary to the position of the Equal Employment Opportunity Commission, this issue is not merely "fact-specific." It goes to the heart of whether and to

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[1]Although the case before it involved a public institutional defendant, the City of Miami, the Eleventh Circuit stated broadly that employment discrimination cases generally that involved affirmative action goals should be governed by *Rufo*.

what extent consent decrees will bind the parties that freely enter into them, a question vital to the continued viability and effectiveness of the settlement of cases in the federal courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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